Jurisdictional Statement

81-1574

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO AND TOMMIE D. ARCHER, *Appellants*,

v.

ROBERT C. JONES, *Appellee*.

On Appeal From The Court Of Appeals State Of Georgia

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

QUESTION 1

Have the Georgia appellate courts invalidated that portion of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A), *et seq.*, which categorizes alleged Union and Union officer interference with employment as an unfair labor practice?

QUESTION 2

Have the Georgia appellate courts denied and abridged the rights of the Union and Union officer T. D. Archer, who was sued personally, to protection under the Supremacy Clause and Interstate Commerce Clause of the Constitution of the United States?

QUESTION 3

Have the Georgia appellate courts denied the Union and Union officer Archer their rights under the Privileges and Immunities Clause, the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the Constitution by the Georgia courts' refusal to apply decisions of this Court concerning pre-emption in labor law?

LIST OF PARTIES IN PROCEEDING

ROBERT C. JONES, Plaintiff
LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, Defendant

T. D. ARCHER, Business Agent, Local 926, IUOE, sued individually as a Defendant

GEORGIA POWER COMPANY, Defendant

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On Appeal From The Court Of Appeals State Of Georgia

JURISDICTIONAL STATEMENT

Local 926, International Union of Operating Engineers and Tommie D. Archer pray to the Court to reverse the decision of the Court of Appeals of the State of Georgia and remand the case for dismissal, thereby reinstating the decision and judgment of the trial court.

OPINION BELOW

The slip opinion of the trial court dismissing the complaint and applying the doctrine of labor law pre-emption is not reported. It appears in Appendix 9a, infra.

The opinion of the Georgia Court of Appeals reversing the trial court is reported at 159 Ga. App. 693 (1981). It appears in Appendix 1a, infra.

The decisions of the Georgia Supreme Court denying the writ of certiorari and denying the motion to reconsider the denial of the writ of certiorari are unreported. They appear in Appendix 12a, infra.

JURISDICTION OF THIS COURT IS INVOKED PURSUANT TO 28 U.S.C. § 1257 (NO. 1), THIS BEING AN APPEAL WHICH DRAWS INTO QUESTION A DECISION OF THE APPELLATE COURTS OF GEORGIA'S REFUSAL TO APPLY THE DOCTRINE OF LABOR LAW PRE-EMPTION.

The Appellants' appeal from a judgment of the Court of Appeals of the State of Georgia in a civil action for alleged tortious interference with an employment relationship. The Court of Appeals ruled that the Appellants may be held liable for punitive damages and attorneys' fees for allegedly interfering with Appellee's employment as a supervisor with Georgia Power Company.

The Court of Appeals for the State of Georgia expressly held that the doctrine of pre-emption did not apply. Therefore, the alleged solicitation by the Union to the employer, Georgia Power Company, to discharge Jones was actionable in the Georgia courts.

The Court also held that because Jones was an at-will employee, the employer could validly fire Jones at any time, even if the alleged underlying cause for the discharge was the alleged improper activity of Appellants Local 926 and Archer.

After the decision of the Court of Appeals, Appellants sought a writ of certiorari from the Supreme Court of Georgia. The Court denied the writ and further denied the later motion to reconsider the denial of the writ.

Thus, there has been a final ruling that Appellants' activities were not protected by the National Labor Relations Act as amended. This judgment has been reviewed by the highest Court of the State of Georgia. This judgment gives rise to a situation which fully meets the requirements of *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). A "reversal of the State court on the Federal issue would be preclusive of any further litigation on the relevant cause of action . . ." *Cox* at 482-483.

Although this case is now remanded to the trial court for further proceedings, the judgment of the Court of Appeals is binding on the trial court and not subject to further review in the courts of Georgia. The decision of the Court of Appeals does not apply the doctrine of pre-emption. The Federal labor law pre-emption claim presented for review here is separate and distinct from the alleged underlying tort. A decision by this Court applying the doctrine of pre-emption, or merely reinstating the decision of the trial court, would avoid a long and costly trial for all concerned and also reestablish the doctrine of labor law pre-emption in the jurisprudence of the State of Georgia.

Therefore, this case is appropriately before this Court.

On September 9, 1981, the Court of Appeals of Georgia rendered its decision. On September 25, 1981, the Court of Appeals for the State of Georgia denied the motions for rehearing. On November 9, 1981, the Supreme Court of the State of Georgia denied Appellants' petition for the writ of certiorari. On November 25, 1981, the Supreme Court of Georgia denied the motion for reconsideration of the denial of the petition for the writ of certiorari filed by Local 926 and Archer.

In the alternative, should this Honorable Court not consider appeal to be the appropriate method of bringing these issues before this Court, Local 926 and Archer respectfully request that the documents whereupon this appeal is taken be regarded and acted upon as a petition for a writ of certiorari pursuant to 28 U.S.C. § 1257 and § 2103.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Statutory and Constitutional provisions violated are as follows:

> It shall be an unfair labor practice for a labor organization or its agents —
>
> (1) to issue or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

29 U.S.C. § 158(b)(1)(A) and (B).

In addition to this particular provisions being rendered invalid, the entire regulatory balance of the National Labor Relations Act as underpinning pre-emption analysis also is rendered invalid by the ignoring of this particular provision. Relevant portions of the statute appear in Appendix 28a.

Local 926 and Archer also rely upon the Supremacy Clause and the Commerce Clause of the Constitution of the United States.

> This constitution, and the laws of the United States which shall be made in pursuant thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

U.S. Const., Art. VI, Clause 2, and

> The Congress shall have power . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

Art. I, § 8, Cl. 3.

STATEMENT OF THE CASE

On June 28, 1978, Respondent Robert C. Jones filed an Unfair Labor Practice charge with the National Labor Relations Board alleging that Local 926, International Union of Operating Engineers had violated sections 8(b)(1)(A) and (B) of the National Labor Relations Act. The National Labor Relations Board investigated the charge and informed Mr. Jones by letter that there was insufficient evidence to establish that the Union caused Jones' discharge, or coerced the Georgia Power Company in the selection of its representative for the purpose of collective bargaining. The National Labor Relations Board Regional Director therefore refused to issue a complaint in the matter.

Jones did not use the appellate rights he had under the National Labor Relations Board procedures. Rather, on December 19, 1978, Jones filed a law suit in the Fulton County Superior Court against Local 926, International Union of Operating Engineers, Tommie D. Archer, individually, and the Georgia Power Company.

Jones claimed the same injuries and operative facts as those claimed in the charge before the National Labor Relations Board. Subsequently, the three Defendants filed a motion to dismiss supported by a memorandum of law. That motion and brief relied upon the doctrine of pre-emption as articulated in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959).

On November 10, 1980, the Honorable Philip F. Etheridge, Judge, State Court of Fulton County, granted the Defendants' motion to dismiss relying on the doctrine of pre-emption.

Jones filed a timely notice of appeal, and all parties briefed the case and argued it before a panel of the Court of Appeals for the State of Georgia. The briefs and argument before the Court of Appeals of the State of Georgia concentrated on the doctrine

of labor law pre-emption. Subsidiary discussions occurred concerning the right-to-work law as a subdivision of the pre-emption argument.

Upon the rendering of the adverse decision of the Court of Appeals, Archer and Local 926 sought relief through application for the writ of certiorari from the Supreme Court of Georgia. That application relied upon Federal labor law pre-emption and upon the Commerce Clause of the Constitution of the United States. U.S. Const., Art. 1, § 8, Cl. 3.

The application was denied. In addition, the request to reconsider was likewise denied. The petition for reconsideration also urged that the doctrine of pre-emption apply to the case. Upon the denial of the motion to reconsider, Local 926 and Archer had exhausted all appellate review within the State of Georgia.

REASONS WHY THE APPEAL IS NECESSARY

The decision of the Court of Appeals for the State of Georgia is in direct and irreconcilable conflict with the pre-emption decision of this Court. The Court of Appeals has held that pre-emption does not apply to this case because state jurisdiction attaches, and pre-emption is ousted as soon as the plaintiff prays for punitive damages and attorney fees. The result of this decision is that Georgia is an enclave wherein the doctrine of labor law pre-emption does not apply as it does in the balance of the United States. Like *Cox Broadcasting*, unions in Georgia are at their peril to act in conformance with the National Labor Relations Act, and still run the risk of being sued for State torts — something this Court has said should occur infrequently.

San Diego Building Trades v. *Garmon*, 359 U.S. 236 (1959) sets forth the general test:

> [W]hen it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by Section 7 of the National Labor Relations Act, or constitute an unfair labor practice under Section 8, due

> regard for Federal enactment requires that State jurisdiction must yield. To leave the states free to regulate conduct so plainly within the central aim of Federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by State law. *Garmon* at 244.

The test imposed by the *Garmon* court in determining whether pre-emption principle should apply is whether or not the "activity is *arguably* either prohibited or protected by the Act." If so, "the states as well as the Federal courts must defer to the exclusive competence of the National Labor Relations Board . . ." *Garmon, id.*

Twice this Court clearly and firmly applied the doctrine of pre-emption to cases almost identical to this case.

In *Iron Workers* v. *Perko*, 373 U.S. 701 (1963) the plaintiff alleged that because of conflicts with the officers of the union, the union and the employer conspired together to deny him the opportunity to work as a foreman. This Court rejected an exception to pre-emption doctrine for Perko.

The Court wrote as follows:

> . . . even if it be assumed that Perko *was not an employee but was solely a supervisor*, there is a sufficient probability that the matter would still have been cognizable by the Board so as to compel the relinquishment of State jurisdiction . . . Moreover, if a union forces an employer to discharge a supervisor, such conduct may well violate § *8(b)(1)(B)* because it coerces the "employer in the selection of his representatives" for the purpose of collective bargaining or the adjustment of grievances . . ." But the probability that such a violation of § 8(b)(1)(B) might have occurred, especially in view of Perko's role in the inter-union dispute that gave rise to the present controversy, is certainly not insignificant . . . (Emphasis supplied). at 707-709.

In its analysis of *Perko*, the Georgia Court of Appeals attempted to distinguish *Perko*, saying that since the Labor Board found that the union had not engaged in any coercion or restraint of the Power Company, Jones is free to pursue his interference case in the Georgia Courts against Local 926 and Archer personally.

To create a distinction between coercion and restraint on one hand, and interference on the other, is to create a distinction without meaning. The entire pre-emption test regulates conduct, not labels.

In *Local 100, Plumbers and Fitters* v. *Borden*, 373 U.S. 690 (1963), this Court rejected artful pleading and applied pre-emption. Borden had pled his case in tort and contract. The conduct complained of was almost identical to that complained of herein: the union interfered with a job opportunity.

In this Court's analysis, it was stated:

> Nor do we regard it as significant that Borden's complaint against the Union sounded in contract as well as in tort. *It is not the label affixed to the cause of action under State law that controls the determination or the relationship between State and Federal jurisdiction.* Rather, as stated in *Garmon, supra,* at 246, "[o]ur concern is with the limiting areas of conduct which must be free from State regulation if national policy is to be left unhampered." at 698. (Emphasis added)

The Court of Appeals' distinction should not stand, since it conflicts with this Court's precedent.

This Court recently held in *ABC* v. *Writers' Guild*, 437 U.S. 411 (1978), that internal union charges brought against supervisors who were union members could be cognizable before the National Labor Relations Board, under 29 U.S.C. § 8(b)(1)(B), because the charges created a pull of conflicting loyalties in the union member, with the possible result of the employer being denied the services of these particular em-

ployees in future grievance handling. As the scope of Section 8(b)(1)(B) charges expands, so does the scope of pre-emption, since activity cognizable under the National Labor Relations Act will perforce carry with it protection of pre-emption. *ABC* strengthens *Perko* and *Borden* and required application of pre-emption to this case, which alleges the same facts as *Perko* and *Borden*.

Borden and *Perko* apply even if one considers *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978) and *Farmers* v. *Carpenters*, 430 U.S. 290 (1977). In *Sears*, the Court set forth this test:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid.
> 436 U.S. at 197.

As is apparent from this case, and the letter from the Regional Director of the National Labor Relations Board to Jones, the *Sears* test is even more strongly met here, in that the employment discrimination issue was presented to the Labor Board and is now presented to the State Court for a second adjudication. The letter of the Labor Board appears as Appendix 26a. The Complaint, and the two amendments appear at Appendix 14a, 18a, 21a.

Likewise in *Farmer*, this Court allowed an intentional infliction of emotional distress case to go forward, so long as it was isolated from allegations of employment discrimination. Jones' amended Complaint shows no *Farmer* allegations, but rather shows a simple allegation of employment discrimination.

Recently in *Mobile Mechanical Contractors Ass'n, Inc.* v. *Carlough*, 664 F.2d 481 (5th Cir. 1981), the Court applied the pre-emption doctrine in a case where the gist of the State law claim was wrongful interference with business. Local 926 maintains that *Mobile Mechanical* should likewise apply to this case, in which Jones claims a wrongful interference with an employment relationship.

ERROR OF THE GEORGIA COURTS

Instead of applying the precedent of this Court, as the trial court had done, the Court of Appeals applied the case of *Carter* v. *Sheet Metal Workers*, 133 Ga. App. 872 (1975). This case holds that where, as here, the individual plaintiff alleges that the union is liable for punitive damages and attorney fees, the doctrine of pre-emption must yield, and state jurisdiction attaches because the National Labor Relations Act only provides for back pay. [1]

The facet in *Carter* v. *Sheet Metal Workers* concerning filling out of remedy was already considered by this Court. In his concurrance, Justice Harlan, in *San Diego Building Trades*

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[1] *Carter* v. *Sheet Metal Workers* is still in litigation. There have been seven appellate considerations of the case. *Carter* v. *Sheet Metal Workers*, 133 Ga. App. 872 (1975) (doctrine of pre-emption does not apply); *Carter* v. *Sheet Metal Workers*, ____ Ga. ____ (1975) (denial of the writ of certiorari by the Supreme Court of Georgia); *Sheet Metal Workers* v. *Carter*, 423 U.S. 1078 (1976) (denial of the writ of certiorari by this Court); *Carter* v. *Sheet Metal Workers*, 144 Ga. App. 48 (1977); *Carter* v. *Sheet Metal Workers*, 241 Ga. 220 (1978) (holding that service of process on an ordinary rank and file member was not sufficient for the assertion of jurisdiction over the defendant international union, thus vacating all prior proceedings in the case); *In re Carter*, 618 F 2d 1093 (5th Cir. 1980) (holding that the remand order of the trial court was reviewable under mandamus, and that there was sufficient Federal jurisdiction to hold the case in the Federal system; and *Sheet Metal Workers* v. *Carter*, 450 U.S. 949 (1981) (denial of writ of certiorari concerning the removal issue).

v. *Garmon*, observed that *Garmon* largely foreclosed State remedy. He wrote as follows:

> The Court's opinion in this case cuts deeply into the ability of States to furnish an effective remedy under their own laws for the redress of past nonviolent tortious conduct which is not federally protected, but which may be deemed to be, or is, federally prohibited. Henceforth the States must withhold access to their courts until the National Labor Relations Board had determined that such unprotected conduct is not an unfair labor practice, a course which, because of unavoidable Board delays, may render State redress ineffective. And in instances in which the Board declines to exercise its jurisdiction, the States are entirely deprived of power to afford any relief. Moreover, since the reparation powers of the Board, as we observed in *Russell*, are narrowly circumscribed, those injured by nonviolent conduct will often go remediless even when the Board does accept jurisdiction. at 253.

Garmon pre-empts filling out of remedy. The Georgia Courts hold filling out may occur. Such a result cannot obtain in labor law, where uniform application of the law is a paramount value of labor law as announced by this Court, precisely because the labor law is grounded on the Supremacy and Commerce clauses of the Constitution.

CONCLUSION

The Court of Appeals of the State of Georgia has held that the doctrine of pre-emption may be lifted so long as a plaintiff prays for punitive damages and attorney's fees. This holding removes the doctrine of pre-emption in the State of Georgia and invalidates portions of the National Labor Relations Act. The decisions of this Court concerning pre-emption have held for uniform application of the labor laws of this country in the several states. Labor organizations and employers of Georgia necessarily rely upon pre-emption and the constitutional guarantees underpinning pre-emption. Removal of the doctrine of pre-emption from the jurisprudence applicable in the State of Georgia requires this Court to reiterate the doctrine of pre-emption as applicable in the State of Georgia, so that labor organizations and employers have certainty that the doctrine of pre-emption exists in this state, as it does in the several states.

Respectfully submitted,

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Appendix

COURT OF APPEALS GEORGIA

61734. JONES V. LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS ET AL.

SOGNIER, Judge.

This appeal raises the question whether the National Labor Relations Act preempts state jurisdiction in a case brought by a non-union employee against a union and employer for tortious interference with and conspiracy to deprive the plaintiff of his contract of employment.

Appellant Jones was offered employment by Superior Consolidated, one of the project contractors on the construction of a Georgia Power Company generating plant. Jones was employed as equipment maintenance superintendent by Superior and Georgia Power.

Jones is a former member of Local 926 of the International Union of Operating Engineers, but had not been a union member for four years. Archer was the business agent for Local 926 in 1974 when Jones stopped paying union dues and went to work for a non-union contractor. Archer is still the business agent for Local 926 and allegedly objected to Jones' employment as equipment maintenance superintendent.

Jones reported for work at the plant construction site on June 12, 1978. By agreement with Superior, Jones took the rest of the week off and reported back to work again on June 20, 1978. On the later date, a meeting took place among officials of Georgia Power, Superior and Local 926, represented by Archer, regarding the maintenance problems that had arisen at the plant which indicated a need for the hiring of an equipment maintenance superintendent. After this meeting, Jones was informed that his services would not be required in that position.

On June 28, 1978, Jones filed charges with the National Labor Relations Board charging Local 926 with procuring his discharge because he was not a member in good standing of the union. After a preliminary investigation of the charged violation of Section 8 of the National Labor Relations Act, the regional director of the NLRB concluded that there was insufficient evidence of an unfair labor

practice to issue a formal complaint. Jones did not appeal this decision.

In December 1978, Jones filed suit in the State Court of Fulton County against Local 926, Archer and Georgia Power alleging (1) that Archer, acting as agent for Local 926, maliciously and intentionally coerced Georgia Power into breaching its employment contract with Jones and (2) that Georgia Power maliciously and intentionally discharged Jones because of his non-membership in the union. Appellant amended his complaint alleging that Georgia Power and Local 926 conspired to deprive him of his employment and interfered with his right to employment. Jones prayed for damages for lost wages, plus punitive damages and attorney fees.

Appellees moved to dismiss Jones' complaint on the ground that the trial court lacked jurisdiction to hear the case in that the subject matter of the complaint was preempted by the National Labor Relations Act. Appellees' motion to dismiss was granted and Jones appeals.

1. Appellant contends that the trial court erred in dismissing the action for tortious interference with an employment contract based on preemption by the NLRA.

(a) "Our courts have spoken loud and clear as to the right of one to earn a livelihood, and to seek redress against anyone who wrongfully causes him to be discharged from employment." *Wiley* v. *Ga. Power Co.*, 134 Ga. App. 187, 190 (213 SE2d 550) (1975); overruled on other grounds, *Ga. Power Co.* v. *Busbin*, 242 Ga. 612, 615 (250 SE2d 442) (1978). Even though a person's employment contract is at will, he has a valuable contract right which may not be unlawfully interfered with by a third person. *Ott* v. *Gandy*, 66 Ga. App. 684 (1) (19 SE2d 180) (1942); *Ga. Power Co.* v. *Busbin*, supra, at 613.

Jones may state his claim of malicious interference with his employmnt against Local 926 and Archer, as the third parties in this case. However, even where Jones has alleged a conspiracy against Georgia Power, his cause of action must fail. Georgia Power as employer could terminate Jones at will and cannot be held liable for a

conspiracy to do that which they legally were entitled to do. *Hill* v. *Delta Air Lines*, 143 Ga. App. 103, 104 (237 SE2d 597) (1977); *Ga. Power Co.* v. *Busbin*, supra, at 614. Dismissal of Georgia Power by the trial court was not error regardless of the preemption issue.

(b) The trial court in its order recognized that this court has decided two cases directly on point regarding preemption by the NLRB of a state case involving tortious interference with employment. In *Sheet Metal Workers &c Assn.* v. *Carter*, 133 Ga. App. 872 (212 SE2d 645) (1975), cert. den. 423 U.S. 1078 , an employee brought suit against a union alleging, inter alia, that the union had caused him to be denied employment in the sheet metal industry. This court affirmed a denial of the union's motion to dismiss based on preemption by the NLRA. This case was again appealed after a jury trial and reversed on the question of service, *Sheet Metal Workers &c.* v. *Carter*, 241 Ga. 220 (244 SE2d 860) (1978). However, the principles of law regarding preemption were not overruled and we view them as applicable here.

In *Carter* this court recognized the rule of preemption set forth in San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (79 SC 773, 3 LE2d 775) (1959): " '[W]hen an activity is arguable subject to § 7 or § 8 of the Act, the States as well as the Federal courts must defer to the exclusive competence of the National Labor Board if the danger of State interference with National policy is to be averted.' " *Sheet Metal Workers &c. Assn.* v. *Carter*, supra, at 874. However, Judge Clark goes on to state that there are situations in which state court jurisdiction is appropriate and has been recognized by the Supreme Court of the United States where conduct touches interests " 'deeply rooted in local feelings and responsibility.' " Id, at 874.

More recently the Supreme Court of the United States has discussed the Garmon rule and recognized that it has not been applied in a number of cases where "the Court has allowed a State to enforce certain laws of general applicability even though aspects of the challenged conduct were arguably prohibited by § 8 of the NLRA. Thus, the Court has upheld state-court jurisdiction over conduct that touches 'interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could

not infer that Congress had deprived the States of the power to act.' [Cits.]" Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 194-195 (98 SC 1745, 56 LE2d 209) (1978).

In *International Brotherhood* v. *Briscoe*, 143 Ga. App. 417 (239 SE2d 38) (1977), this court reviewed a fact situation identical to that presented in the instant case, i.e., an action by a non-union person whose employment was terminated allegedly because the union had caused the employer to be intimidated and coerced into breaking its contract of employment with him. The *Briscoe* court, relying on *Carter*, held that the cause was *not* within the exclusive jurisdiction of the NLRB under Garmon.

This court also held in *Briscoe* that Farmer v. Carpenters, 430 U.S. 290 (97 SC 1056, 51 LE2d 338) (1977), did not require a different result where "[t]here is little risk here that the state cause of action would interfere with the effective administration of national labor policy . . . 'Viewed . . . in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference [with the regulatory jurisdiction of the Labor Board] is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens.' Farmer (97 SC at 1065, 51 LE2d at 352)." *Briscoe*, supra, at 422.

2. The trial court in the instant case declined to follow *Carter* and *Briscoe* because in neither case had an unfair labor practice charge been filed with the NLRB regarding the allegedly tortious activity. We disagree with the trial court that such a difference distinguishes the instant case from *Carter* and *Briscoe*, as to require a different result.

(a) Jones filed his charge against Local 926 and Archer on June 28, 1978 alleging that the union "caused and procured" his discharge and "thereby coerced the employer . . . in the selection of its supervisors and bargaining representative, because said individual had not been a member in good standing of said labor organization." The charge was alleged as an unfair labor practice within the meaning of § 8 (b) of the NLRA which states "[i]t shall be an unfair labor practice for a labor organization or its agents — (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 . . .

or (B) an *employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.* (Emphasis supplied.) 29 U.S.C. § 158 (b) (1) (A) and (B).

Upon investigation and consideration, the regional director of the NLRB refused to issue a complaint regarding the charges filed. In a letter to Jones, the regional director stated: "the evidence was insufficient to establish that the Union caused your discharged (sic) or that it restrained or coerced the Employer in the selection of its representative for the purpose of collective bargaining."

Jones did not appeal this decision. The question this court is asked to decide is whether or not such a statement by the regional director must necessarily end the inquiry into Jones' allegations against the Union. A ruling that the union was found *not* to have "coerced" an employer in the selection of the employer's representative under the Act does not preclude this suit based on malicious *interference* with an employment contract. The two cases while arising from the same conduct are dissimilar enough to present separate and distinct issues for adjudication.

Appellee Union contends that Sears Roebuck & Co. v. Carpenters, supra., requires that the trial court refrain from exercising jurisdiction in this case where the test is "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been . . . presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board which the arguably prohibited branch of the Garmon doctrine was designed to avoid." Sears, supra, at p. 197.

However, the court in Sears goes on to distinguish between the controversy which might have been presented to the Board and that which was presented to the state court. The federal and state issues were "completely unrelated" to the simple question of state law involved. Similarly, the federal issue here is whether the Union has committed an unfair labor practice by coercing an employer in the selection of the employer's representatives for purposes of collective bargaining. In the state action, Jones alleges that the Union interfered

with his contract of employment with Georgia Power and suffered damage thereby. Permitting the state court to adjudicate Jones' tort claim would create no realistic risk of a conflict with the Labor Board's determination that there had been no unfair labor practices under § 8 (b) (1) (B). Id., at 198.

Judge Clark's reasoning in *Carter* is applicable here even where a charge had already been filed and rejected by the NLRB. "We recognize the instant case may be within the jurisdiction of the National Labor Relations Board even though it does not involve an employer as a party. Nevertheless, the state's concern 'to protect the rights of its citizens' requires us to acknowledge that the plaintiff here would be deprived of certain legal rights in the event we ruled the state court lacked jurisdiction. We refer to the fact that the power of the NLRB is limited by the provisions of the federal statute. When the board finds either a union or an employer guilty of an unfair labor practice it has the power to enter a cease and desist order '. . . and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . .' 29 U.S.C. § 160 (c). Although the appellant Unions argue that this remedy would enable the NLRB to make the plaintiff whole, it is obvious that it does not include power to award him exemplary damages or attorney fees. Under Georgia law a plaintiff has the right upon presentation of proper proof satisfactory to the court and jury to receive punitive damages (Code § 105-2002). Reasonable attorney fees also may be awarded in certain instances. Code § 20-1404; *Traders Ins. Co.* v. *Mann,* 118 Ga. 381, 384 (45 SE 426); *Roberts Pest Control* v. *McDonald,* 1342 Ga. App. 257, 260 (4) (208 SE2d 13).

"As is observed in the Linn [Linn v. United Plant Guard Workers, 383 U.S. 53 (86 SC 657, 15 LE2d 582) (1966)] case at page 63: 'The Board can award no damages, impose no penalty, or give any other relief to the defamed individual. On the contrary, state remedies have been designed to compensate the victim and enable him to vindicate his reputation. The board's lack of concern with the "personal" injury

caused by malicious libel, together with its inability to provide redress to the maligned party, vitiates the ordinary arguments for pre-emption.' The court's observation dealt with a libel action but those views are appropriate to the instant case. Moreover, this special situation as to punitive damages was recognized in International Union U.A.W. v. Russell, 356 U.S. 634 (78 SC 932, 2 LE2d 1030). There the court noted that 'Congress did not establish a general scheme authorizing the Board to award full compensatory damages for injuries caused by wrongful conduct. United Workers v. Laburnum Corp., 347 U.S. 656, 666-667.' Id. p. 643. It ruled that plaintiff was entitled to maintain his action in the state jurisdiction stating that '. . . an employee's right to recover, in the state courts, *all* damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here . . .' Id. p. 646." *Carter*, supra, at p. 875-876.

Appellee cites *Hudgens* v. *Local 315*, 133 Ga. App. 329, 334 (210 SE2d 821) (1974) to support its argument that the instant case is preempted because a charge had been filed with the NLRB. We find *Hudgens* distinguishable from the instant case. In *Hudgens* this court held that "as this case involved the question of peaceful picketing it was exclusively within the federal jurisdiction," and "the N.L.R.B. had there ruled that the picketing here complained of was a protected activity under the Federal Act and had also held that the threat to arrest the pickets for criminal trespass was an unfair labor practice, we find this controversy does not come within either of the two [Garmon] exceptions [i.e., where the activity involved is a peripheral concern of the federal Act or where the regulated conduct touched interests deeply rooted in local feeling or responsibility]." Id., at p. 334-335. In the instant case we do not have "protected" activity, nor do we have a finding by the Board of an unfair labor practice. Rather, we have an interest deeply rooted in local feeling or responsibility, the power of a state to protect the rights of its citizens. *International Brotherhood* v. *Briscoe*, supra, p. 423. As Judge Clark pointed out in *Hudgens*, ". . . our ruling in no way limits the right of state courts to handle civil damage suits which may arise from labor disputes." *Hudgens*, supra, at p. 335.

(b) As pointed out in *Briscoe*, there is an additional reason the state court is not preempted by the NLRA. Jones was hired as equipment maintenance superintendent, a supervisory position. In Iron Workers v. Perko, 373 U.S. 701 (83 SC 1429, 10 LE2d 646) (1963), the Supreme Court held that "if a union forces an employer to discharge a supervisor, such conduct may well violate § 8 (b) (1) (B) because it coerces the 'employer in the selection of his representatives for the purposes of collective bargaining or the adjudication of grievances.' " Id., at 708. However, Perko involved a union member classified as a foreman, whose status as an "employee" fluctuated and who may have had sufficient responsibilities with regard to grievances to bring § 8 (b) (1) (B) into play. Such a question would be determined by the Board. In the instant case the regional director has already determined and indicated in his letter that there had been no coercion of the employer in the selection of its representative for the purpose of collective bargaining under § 8 (b) (1) (B).

With regard to an unfair labor practice charge under § 8 (b) (1) (A), " 'It has long been recognized that supervisors are not entitled to the protection afforded "ordinary employees" under the Act, and that "as to supervisors there can be no such thing as a discriminatory discharge or an unfair labor practice." [Cits.]' " *International Brotherhood* v. *Briscoe*, supra, p. 425.

The trial court erred in granting the Union's motion to dismiss for lack of jurisdiction.

3. Appellant contends that the trial court erred is dismissing his complaint where there is an apparent violation of the Georgia right to work laws. It is undisputed that Jones was hired as a supervisor by the employer here. The Supreme Court of the United States has held that supervisors are not accorded the status of "employees" under state law for purposes of right to work statutes since such an application of state law would flout the national policy against compulsion upon employers from either federal or state agencies to treat supervisors as employees. *Beasley* v. *Food Fair of N.C.*, 416 U.S. 653 (94 SC 2023, 40 LE2d 443) (1974). The trial court was correct in not considering appellant's claim based on a violation of the state right to work statutes.

Judgment affirmed in part; reversed in part. Shulman, P. J., and Birdsong, J., concur.

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE NO. 693569

ROBERT C. JONES,

Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, THOMAS D. ARCHER and GEORGIA POWER COMPANY,

Defendants, Jointly and Individually.

ORDER

The defendants in the above-styled case have moved to dismiss the plaintiff's complaint on the ground that this Court lacks jurisdiction over the subject matter presented by the complaint in that the complaint sets forth a cause of action which is preempted by applicable federal labor laws. A hearing on this motion was held before the Honorable Philip F. Etheridge on December 14, 1979, after which the matter was taken under advisement. After considering the arguments and briefs of counsel for both parties, the court now makes the following conclusions:

Preemption is designed to "avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971). The original test, as set out in *San Diego Building Trade Council* v. *Garmon*, 359 U.S. 236 (1959) provided that preemption is required "when an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act," *Garmon*, at 245. Exceptions are permitted when "(1) the activity regulated was merely a peripheral concern of the [Act]" or (2) "where the regulated conduct touched interests . . . deeply rooted in local feeling and responsibility . . ." *Garmon* at 243-44. The recent case of *Sears Roebuck & Co.* v. *San*

Diego County District Council of Carpenters, 436 U.S. 180 (1978) has explained and expanded the *Garmon* test. Under the *Sears* test, State Courts may assume jurisdiction over a matter even though the activity may be "arguably" within the NLRA if (1) "there exists a significant state interest in protecting the citizens from the alledged conduct" or (2) "there is little risk of interference with the regulatory jurisdiction of the Labor Board."

The conduct complained of in the *Jones* case, tortious interference with an employment contract, neither "touches interests . . . deeply rooted in local feeling and responsibility" nor presents such a significant State interest so as to allow the State Court to assume jurisdiction. While the U.S. Supreme Court has held that violent acts, obstruction of access to property, *Auto Workers* v. *Russell*, 356 U.S. 634 (1968), defamation, *Sears*, *supra*, and internal infliction of emotional distress, *Linn* v. *Plant Guard Workers*, 338 U.S. 53 (1966); *Farmer* v. *United Brotherhood of Carpenters*, 430 U.S. 290 (1977), are all within a proscribed area of torts that are "deeply rooted in local feeling and responsibility" the alleged conduct in the case *sub judice*, in this court's opinion, does not rise to such a level of overriding State interest as to bring it within the ambit of the State's jurisdiction.

In determining whether the second part of the *Sears* test is met the principal inquiry is:

> Whether the controversy presented to the State Court is identical to or different from that which could have been, but was not, presented to the Labor Board . . . It is only in the former situation that a State Court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the Board, which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid. 98 S. Ct. at 1958.

In *Jones* it is clear that the controversy before the State Court is identical to the controversy presented to the NLRB. The adjudication of the issue presented to this court would necessarily involve the merits of the underlying labor controversy. Since the focus of the Board and State procedures would be identical there is a real danger of two different resolutions to the same problem. As there is such a great risk of State interference with the National Labor policy in the adjudication of this claim, the State must yield jurisdiction.

In addition to the above-stated reasons, the State Court should not assume jurisdiction over the plaintiff's allegations since the Labor Board has already exercised jurisdiction over this matter. The Board apparently dismissed plaintiff's claim after it had considered the merits of the case and found the plaintiff's evidence to be insufficient. It is important to note that the claim was not dismissed upon the jurisdictional ground of noncoverage of supervisory employees. As such, the plaintiff's assertion that he is not covered by the Labor Act has no merit. Since the NLRB has already scrutinized the alleged conduct complained of, it is not within this court's jurisdiction to take a second look at the same actions.

This prior adjudication by the NLRB is precisely what distinguishes the case at bar from both Georgia cases that the plaintiff cites as controlling. While the court is aware that *Sheet Metal Workers International* v. *Carter, et al.*, 133 Ga. App. 872, 212 S.E. 2d 645 (1975) and *International Brotherhood of Electrical Workers* v. *Briscoe*, 143 Ga. App. 417, 239 S.E. 2d 38 (1977) appear to be factually identical to the *Jones* case, there is a major distinction that can and should be drawn — the NLRB has already considered and ruled on Plaintiff Jones' allegations while neither of the Georgia cases had ever been presented to the Board. It is this court's opinion, after making a balanced inquiry into the nature of the federal and state interests in regulation and the potential for interference with federal regulation (as proscribed by *Farmer* at p. 430), that the State Court's jurisdiction is preempted by the National Labor Relations Act.

For the foregoing reasons, IT IS HEREBY ORDERED AND ADJUDGED that the defendant's motion is hereby GRANTED and Plaintiff's Complaint is hereby Dismissed

This the 10th day of November, 1980

/s/ JUDGE PHILIP F. ETHERIDGE
Judge Philip F. Etheridge
STATE COURT OF FULTON COUNTY

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta Nov. 9 1981

Case No. 38114 Local 926 of the International Union of Operating Engineers et al v. Jones.

The Supreme Court today denied the writ of certiorari in this case.

All the justices concur, Hill, P. J. dissents.

Very truly yours,

MRS. JOLINE B. WILLIAMS, Clerk

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Dear Sir: Atlanta Nov. 25, 1981

The motion for a reconsideration was denied today: Case No. 38114. Local 926 etc. v. Jones Weltner, J., not participating.

Yours very truly,

MRS. JOLINE B. WILLIAMS, Clerk

COURT OF APPEALS
STATE OF GEORGIA

CASE NUMBER 61734

ROBERT C. JONES,

Plaintiff,

v.

LOCAL 926 INTERNATIONAL UNION OF OPERATING ENGINEERS, and TOMMIE D. ARCHER,

Defendants.

NOTICE OF APPEAL

COME NOW Local 926, International Union of Operating Engineers and Tommie D. Archer and give notice that they appeal from the decision rendered by this Court on September 9, 1981 to the Supreme Court of the United States.

/s/ JAMES T. LANGFORD
James T. Langford

JACOBS & LANGFORD, P.A.
1000 Rhodes-Haverty Building
134 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 522-4280

File date: Feb. 11, 1982
3:42 PM
Clerk: ALTON HAWK
Clerk Court Appeals Georgia

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE NO. 693569

ROBERT C. JONES,

Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, THOMAS D. ARCHER and GEORGIA POWER COMPANY,

Defendants, Jointly and Individually.

COMPLAINT

Now comes the Plaintiff in the above-styled action and for his complaint, shows the court the following:

Count I

1.

Local 926 of the International Union of Operating Engineers (hereinafter referred to as "Local 926"), is an unincorporated association doing business in Fulton County, Georgia, with an office at 250 Tenth Street, N.E., Atlanta, Fulton County, Georgia, where service may be had upon Thomas D. Archer, pursuant to Ga. Code Ann. § 3-119.

2.

Thomas D. Archer is the business agent and representative of Local 926, is a resident of the State of Georgia, is subject to the jurisdiction of this court, and may be served at his place of employment at 250 Tenth Street, N.E., Atlanta, Fulton County, Georgia.

3.

Georgia Power Company is a public corporation chartered by the Secretary of State of the State of Georgia with an office at 270

Peachtree Street, N.W., Atlanta, Fulton County, Georgia, where it can be served through its registered agent for service, I.S. Mitchell, III, and said corporation is subject to the jurisdiction of this Court.

4.

Plaintiff herein was a member of Local 926 from approximately 1969 to 1974, at which time he resigned.

5.

During the month of April 1978, Plaintiff was offered a position as Equipment Superintendent at Plant Scherer through Ronald Ponsell, a representative of Georgia Power Company, which offer of employment was accepted and all terms thereof agreed to by the representatives of Georgia Power Company and the Plaintiff. Plaintiff reported to work at Plant Scherer on or about June 12, 1978.

6.

On or about June 20, 1978, Thomas D. Archer, acting on behalf of and as an agent of Local 926, maliciously and with full intent, intimidated and coerced Georgia Power Company, or caused Georgia Power Company to be intimidated and coerced, into breaching its employment contract with the Plaintiff.

7.

In reliance upon the agreement for employment between Georgia Power Company and the Plaintiff, Plaintiff had terminated his prior employment.

8.

As a result of the malicious and willful acts enumerated above, Plaintiff lost his employment with Georgia Power Company or with any assignee of Plaintiff's employment contract with Georgia Power Company and has suffered damages in the amount of $25,000.00 in lost wages and privileges which had been granted in conjunction with this job.

WHEREFORE, Plaintiff prays:

A. That process issue requiring Thomas D. Archer and Local 926 to answer and appear according to the laws of the State of Georgia; and

B. That Plaintiff be awarded a judgment against Thomas D. Archer and Local 926, jointly and individually, in the amount of $25,000.00 for lost wages and privileges, plus $50,000.00 in punitive damages, plus $5,000.00 in attorneys fees, interest, and the costs of this action; and

C. For such other and further relief as this Court sees fit.

Count II

9.

The Plaintiff incorporates and makes a part of Count II all paragraphs in Count I above.

10.

On or about June 20, 1978, Georgia Power Company, acting through its agent, F. D. Mitchell, did maliciously and with full intent discharge the Plaintiff from his employment with Georgia Power Company because Plaintiff was not a member of Local 926 of the International Union of Operating Engineers, a labor organization.

WHEREFORE, Plaintiff prays:

A. That process issue requiring Georgia Power Company to answer and appear according to laws of the State of Georgia; and

B. That Plaintiff be awarded judgment against Georgia Power Company in the amount of $25,000.00 for lost wages and privileges, plus $50,000.00 in punitive damages, plus $5,000.00 in attorneys fees, interest, and costs of this action; and

C. For such other and further relief as this Court sees fit.

NOVY & RUMSEY
Attorneys for the Plaintiff

/s/ EUGENE NOVY,
Eugene Novy, For the Firm

/s/ PENELOPE W. RUMSEY,
Penelope W. Rumsey, For the Firm

NOVY & RUMSEY
Attorneys at Law
232 Candler Building
127 Peachtree St., N.E.
Atlanta, Georgia 30303
(404) 525-6146

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE NO. 693569

ROBERT C. JONES,

Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, THOMAS D. ARCHER and GEORGIA POWER COMPANY,

Defendants.

AMENDMENT TO COMPLAINT

Now comes the Plaintiff and pursuant to the provisions of Ga. Code Ann. § 81A-115, amends his Complaint by deleting Count Two of the original Complaint in its entirety and substituting in lieu thereof the following Count Two and by adding Count Three as states herein:

Count Two

9.

The Plaintiff incorporates the allegations of Count One above for inclusion in Count Two as if set out in their entirety; and

10.

On or about June 12, 1978, and continuing through June 20, 1978, Local 926 of the International Union of Operating Engineers (hereinafter referred to as "Local 926, I.U.O.E."), Thomas D. Archer, Georgia Power Company and Superior Electric (now Superior Contractors and Associates) and other parties presently not known to the Plaintiff did, by acts in concert, combination or conspiracy, one with the other, conspire to deprive the Plaintiff of his employment, or interfere with the Plaintiff's rights of employment, because he was not a member of Lcoal 926, I.U.O.E.; and

11.

Because of the acts in concert, combination or conspiracy by the parties set out above, the Plaintiff was actually deprived of his employment and his right to such employment was interfered with by being discharged from his employment, all such acts being in violation of the laws of the State of Georgia; and

Count Three

12.

The Plaintiff incorporates the allegations of Count One above for inclusion in Count Three as if set out in their entirety; and

13.

On or about June 20, 1978, Georgia Power Company or Superior Electric or both, individually or acting as agent one for the other or jointly, did maliciously and with full intent discharge the Plaintiff from his employment with Georgia Power Company or Superior Electric or both because Plaintiff was not a member of Local 926, I.U.O.E.

WHEREFORE, Plaintiff prays:

A. That the Amendment to the Complaint of the Plaintiff herein be incorporated into the original Complaint of the Plaintiff; and

B. That the prayer of the original Complaint be incorporated herein and made a part hereof; and

C. For such other and further relief as this Court sees fit in the premises.

NOVY, RUMSEY & MARTIN
Attorneys for the Plaintiff

/s/ EUGENE NOVY,
Eugene Novy, For the Firm

/s/ PENELOPE W. RUMSEY,
Penelope W. Rumsey, For the Firm

NOVY, RUMSEY & MARTIN
Attorneys at Law
232 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303
(404) 525-6146

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE NO. 693569

ROBERT C. JONES,

Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, THOMAS D. ARCHER, GEORGIA POWER COMPANY, and SUPERIOR CONTRACTORS AND ASSOCIATES, INC.,

Defendants.

SECOND AMENDMENT TO THE COMPLAINT

NOW COMES the Plaintiff and pursuant to the provisions of *Ga. Code Ann.* § 81A-115, amends his Complaint by adding the following paragraphs and incorporating all portions of the original Complaint as amended herein.

3a.

Superior Contractors and Associates, Inc. is a Georgia Corporation, licensed to do business in the State of Georgia, with its agent for service being Mr. Tommy L. Lanier, who may be served at 5107 Allatoona Drive, Acworth, Cobb County, Georgia 30101. Superior Contractors and Associates, Inc. is subject to the jurisdiction of this Court.

14.

In addition to the original Complaint, Amended Complaint and Order of the Court adding Superior Contractors and Associates, Inc. as a party Defendant to this action, the following pleadings, motions, discovery requests and responses, and orders, have been filed in this action:

(a) Answer of Defendant, Georgia Power Company; and

(b) Answer of Defendant, Local 926 of the International Union of Operating Engineers; and

(c) Answer of Defendant, Thomas G. Archer; and

(d) Defendant's Notice to Take Deposition of the Plaintiff; and

(e) Defendant Georgia Power Company's Request for Production of Documents to Plaintiff; and

(f) Defendants' Joint Motion to Dismiss Plaintiff's Complaint; and

(g) Plaintiff's First Continuing Interrogatories to Defendant, Georgia Power Company; and

(h) Defendant Georgia Power Company's First Continuing Interrogatories to Plaintiff; and

(i) Plaintiff's Notice to Take the Deposition of Flem Mitchell; and

(j) Plaintiff's Request for Production of Documents to Georgia Power Company; and

(k) Plaintiff's Answers to Georgia Power Company's First Interrogatories; and

(l) Plaintiff's First Amendment to his Answers to Georgia Power Company's Interrogatories; and

(m) Defendant Georgia Power Company's Answers to Plaintiff's First Interrogatories; and

(n) Plaintiff's Second Notice to Take Deposition of Flem Mitchell; and

(o) Defendant Georgia Power Company's Response to Plaintiff's First Request for Production of Documents; and

(p) Plaintiff's Motion to Compel Discovery against Defendant, Georgia Power Company; and

(q) Defendant Georgia Power Company's Motion for Protective Order; and

(r) Plaintiff's Third Notice to Take the Deposition of Flem Mitchell; and

(s) Plaintiff's Notice to Take the Deposition of Ronnie Ponsell; and

(t) Plaintiff's Notice to Take the Deposition of Olin Heath; and

(u) Plaintiff's Notice to Take the Deposition of Thomas D. Archer; and

(v) Plaintiff's Notice to Take the Deposition of Wayne Wilhoit; and

(w) Plaintiff's Notice to Take the Deposition of Thomas Gardner; and

(x) Plaintiff's Notice to Take the Deposition of Ronnie Lanier; and

(y) Plaintiff's Second Request for Production of Documents to Defendant Georgia Power Company; and

(z) Defendant Georgia Power Company's Second Interrogatories to Plaintiff; and

(aa) Defendant Georgia Power Company's Request for Production of Documents to Plaintiff; and

(bb) Rule Nisi setting date for hearing on Joint Motion to Dismiss; and

(cc) Plaintiff's Answer to Defendant Georgia Power's Request for Production of Documents;

(dd) Plaintiff's Answer to Defendant Georgia Power's Second Interrogatories; and

(ee) Plaintiff's Motion for Joinder of Party Defendant; and

(ff) Plaintiff's Supplemental Answers to Georgia Power Company's Second Interrogatories; and

(gg) Defendant Georgia Power Company's Motion to Compel Discovery from the Plaintiff; and

(hh) Court's Order on Defendant Georgia Power Company's Motion to Compel Discovery.

NOVY & RUMSEY

/s/ EUGENE NOVY
Eugene Novy

/s/ PENELOPE W. RUMSEY
Penelope W. Rumsey

1348 Ponce de Leon Ave. N.E.
Atlanta, Georgia 30306
(404) 378-4507

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

CIVIL ACTION FILE NO. 693569

ROBERT C. JONES,

Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, THOMAS D. ARCHER, GEORGIA POWER COMPANY, and SUPERIOR CONTRACTORS AND ASSOCIATES, INC.,

Defendants.

ORDER

The Plaintiff having moved for an Order directing that Superior Contractors and Associates, Inc. be joined as a party Defendant in this action and it appearing to the Court that Superior Contractors and Associates, Inc. is needed for a just adjudication of this action and that it is subject to the jurisdiction of this Court, it is

ORDERED that Superior Contractors and Associates, Inc. is hereby made a part Defendant to this action and that the Plaintiff shall have the Complaint, Amended Complaint, Second Amended Complaint and a list of all other pleadings, motions, discovery requests and orders filed in this matter, served on Superior Contractors and Associates, Inc., together with a Summons and a copy of this Order, in the same manner as provided by law for an original Complaint.

This 14th day of Oct., 1980.

/s/ PHILIP F. ETHERIDGE, JUDGE
Philip F. Etheridge, Judge
STATE COURT OF FULTON COUNTY

FORM NLRB-501 (2-70)

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practices occurred or is occurring.

DO NOT WRITE IN THIS SPACE

Case No. 10-CB-2503

Date Filed 6-20-78

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

a. Name	b. Union Representative to Contact	c. Phone No.
INTERNATIONAL UNION OF OPERATING ENGINEERS, Local 926	T. D. ARCHER, Business Agent	873-1906

d. Address (Street, city, State and ZIP code)

250 Tenth Street, N.E., Atlanta, Georgia 30309

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (1)(A) and (2) (List Subsections) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about June 15, 1978, and thereafter, the above-named labor organization caused and procured the discharge of Robert C. Jones, and thereby coerced the employer named below in the selection of its supervisors and bargaining representative, because said individual had not been a member in good standing of said labor organization.

DEFENDANT'S EXHIBIT D-CB1 2/26/79 J.S.

3. Name of Employer	4. Phone No.
Georgia Power Company	
5. Location of Plant Involved (Street, city, State and ZIP code)	**6. Employer Representative to Contact**
270 Peachtree Street, N.W., Atlanta, Georgia 30303	

7. Type of Establishment (Factory, mine, wholesaler, etc.)	8. Identify Principal Product or Service	9. No. of Workers Employed
Construction	Plant Scherer power plant project	approx 50

10. Full Name of Party Filing Charge
Robert C. Jones

11. Address of Party Filing Charge (Street, city, State and ZIP code)	12. Telephone No.
2954 Orchard Lane, S.E., Atlanta, Georgia 30354	363-3256

13. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By Robert C. Jones (Signature of representative or person making charge) — An Individual (Title or office, if any)

Address 2954 Orchard Lane, S.E., Atlanta, Georgia 30354 — 363-3256 (Telephone number) — 6/24/78 (Date)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

July 19, 1978

Robert C. Jones
2954 Orchard Lane, S.E.
Atlanta, Georgia 30354

Re: International Union of Operating
Engineers, Local 926
Case 10-CB-2905

Dear Mr. Jones:

The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it does not appear that further proceedings on the charge are warranted. The Region concluded that the evidence was insufficient to establish that the Union caused your discharge or that it restrained or coerced the Employer in the selection of its representative for the purposes of collective bargaining. Rather, it appears that the Employer implemented certain changes in its supervisory structure which included your removal from the project. While the Union did participate in discussions regarding the changes, there was no evidence that it engaged in any unlawful conduct regarding your status as a supervisor. I am, therefore, refusing to issue complaint in this matter.

Form NLRB-4938, Procedure for Filing an Appeal, is attached. The appeal period expires at the close of business on August 1, 1978.

Very truly yours,

/s/ Curtis L. Mack
Regional Director

Attachments

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

cc: The General Counsel
Attn: Office of Appeals
National Labor Relations Board
Washington, D.C. 20570

T. D. Archer, Business Agent
International Union of Operating
Engineers, Local 926
250 Tenth Street, N.E.
Atlanta, Georgia 30309

National Labor Relations Act

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That

no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a);

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or

in an industry affecting commerce, where in either case an object thereof is:

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by section 8(e);

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work:

Provided, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any

person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

(5) to require of employees covered by an agreement authorized under subsection (a)(3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected;

(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed; and

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: *Provided*, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided further*, That nothing in this subparagraph (C) shall be construed to prohibit

any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice* period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section* shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days;

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by the labor organization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.*

(e) It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection (e) shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: *Provided further*, That for the purposes of this subsection (e) and section 8(b)(4) (B) the terms "any employer," "any person engaged in commerce or in industry affecting commerce," and "any person" when used in relation to the terms "any other producer, processor, or manufacturer," "any other employer," or "any other person" shall not include persons in the relation of a jobber, manufacturer, contractor, or subcontractor working on the goods or premises of the jobber or manufacturer or performing parts of an integrated process of production in the apparel and clothing industry: *Provided further*, That nothing in this Act shall prohibit the enforcement of any agreement which is within the foregoing exception.

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* Pursuant to Public Law 93-360, 93d Cong., S. 3203, 88 Stat. 396, the last sentence of Sec. 8(d) is amended by striking the words "the sixty day" and inserting the words "any notice" and by inserting before the words "shall lose" the phrase "or who engages in any strike within the appropriate period specified in subsection (g) of this section." In addition, the end of paragraph Sec. 8(d) is amended by adding a new sentence "Whenever the collective bargaining . . . aiding in a settlement of the dispute."

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, or (2) such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (3) such agreement requires the employer to notify such labor organization of opportunities for employment with such employer, or gives such labor organization an opportunity to refer qualified applicants for such employment, or (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act: *Provided further*, That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e).*

(g) A labor organization before engaging in any strike, picketing, or other concerted refusal to work at any health care institution shall, not less than ten days prior to such action, notify the institution

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* Sec. 8(f) is inserted in the Act by subsec. (a) of Sec. 705 of Public Law 86-257. Sec. 705(b) provides:

> Nothing contained in the amendment made by subsection (a) shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

in writing and the Federal Mediation and Conciliation Service of that intention, except that in the case of bargaining for an initial agreement following certification or recognition the notice required by this subsection shall not be given until the expiration of the period specified in clause (B) of the last sentence of section 8(d) of this Act. The notice shall state the date and time that such action will commence. The notice, once given, may be extended by the written agreement of both parties.**

29 U.S.C. § 157-158

** Pursuant to Public Law 93-360, 93d Cong., S. 3203, 88 Stat. 396, Sec. 8 is amended by adding subsection (g).

Joint Appendix

Office - Supreme Court, U.S.
FILED
AUG 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1574

IN THE
Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL 926, INTERNATIONAL UNION OF
OPERATING ENGINEERS,
AFL-CIO AND TOMMY D. ARCHER, *Appellants*,

v.

ROBERT C. JONES, *Appellee*.

On Appeal From The Court Of Appeals
State Of Georgia

JOINT APPENDIX

JOSEPH JACOBS
HARRIS JACOBS
JAMES T. LANGFORD
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Jurisdictional Statement Filed February 22, 1982
Jurisdiction Postponed May 24, 1982

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STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action
File No. 693569

ROBERT C. JONES,

Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, TOMMY D. ARCHER, and GEORGIA POWER COMPANY,

Defendants.

DOCKET ENTRIES

1. Complaint—December 19, 1978
2. Answer—Georgia Power Company—January 18, 1979
3. Answer—Local 926, International Union of Operating Engineers—January 19, 1979
4. Answer—Tommy D. Archer—January 19, 1979
5. Defendants' Joint Motion to Dismiss Plaintiff's Complaint—March 5, 1979
6. Deposition of Wayne Wilhoit—January 4, 1980
7. Deposition of Robert C. Jones—January 8, 1981
8. Notice of Appeal—December 9, 1980

COURT OF APPEALS FOR THE
STATE OF GEORGIA

Docket No. 61734

ROBERT C. JONES,
Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, TOMMY D. ARCHER, and GEORGIA POWER COMPANY,
Defendants.

DOCKET ENTRIES

1. Enumeration of Errors and Brief of Jones—February 17, 1981
2. Brief of Georgia Power Company—March 10, 1981
3. Joint Brief for Local 926, Operating Engineers and Tommy D. Archer—March 11, 1981
4. Decision of Court—September 9, 1982
5. Motion for Re-Hearing by Local 926, Operating Engineers and Tommy D. Archer—September 21, 1981
6. Notice of Intent to Seek the Writ of Certiorari from the Supreme Court of the State of Georgia—October 1, 1981
7. Motions to Stay Remittitur—December 9, 1981
8. Notice of Appeal to United States Supreme Court—February 11, 1982
9. Letter from United States Supreme Court saying "postponing hearing of jurisdiction"—May 26, 1982

SUPREME COURT OF THE
STATE OF GEORGIA

Docket No. 38114

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, TOMMY D. ARCHER, and GEORGIA POWER COMPANY,

Petitioners,

v.

ROBERT C. JONES,

Respondent.

DOCKET ENTRIES

1. Petition for Writ of Certiorari—October 22, 1981
2. Petition for Certiorari denied—November 9, 1981
3. Petition for Reconsideration of the Denial of Certiorari—November 18, 1981
4. Denial of the Petition to Reconsider—November 25, 1981

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File
No. 693569

ROBERT C. JONES,

Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, TOMMY D. ARCHER, and GEORGIA POWER COMPANY,

Defendants.

JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT

NOW COMES the Defendants, jointly, by and through their attorneys, and move this Court pursuant to § 12(b) of the Civil Practice Act [*Ga. Code Ann.* 81A-112(b)] to dismiss the above-styled action on the following grounds:

(1) Plaintiff has failed to state a claim on which relief can be granted.

(2) This Court lacks jurisdiction over the subject matter presented by the Complaint in that the Complaint sets forth a cause of action which is preempted by applicable federal labor laws.

(3) Plaintiff's Complaint seeks damages for personal injuries not within the jurisdiction of this Court.

This the 5th day of March, 1979.

Filed in Office
Mar 5 1979
Deputy Clerk State Court
Fulton County, Ga.

Respectfully submitted,

/s/ Michael C. Murphy
MICHAEL C. MURPHY

/s/ Charles W. Whitney
CHARLES W. WHITNEY

Attorneys for Defendant
GEORGIA POWER COMPANY

Of Counsel:

TROUTMAN, SANDERS,
LOCKERMAN & ASHMORE
1400 Candler Building
Atlanta, Georgia 30303
(404) 658-8000

/s/ Harris Jacobs
HARRIS JACOBS

/s/ Melvin Radowitz
MELVIN RADOWITZ

Attorneys for Defendants
LOCAL 926 OF THE INTERNATIONAL
UNION OF OPERATING ENGINEERS
and THOMAS D. ARCHER

Of Counsel:

JACOBS, JACOBS & DAVIS
707 Healey Building
Atlanta, Georgia 30303
(404) 522-4280

NOTICE OF MOTION

TO: Eugene Novy
Penelope W. Rumsey
NOVY & RUMSEY
Attorneys at Law
232 Candler Building
127 Peachtree Street, N.E.
Atlanta, Georgia 30303

Attorney for Plaintiff, Robert C. Jones

Please take notice that the undersigned will bring the above Motion on for hearing at the convenience of the Court.

/s/ Charles W. Whitney
CHARLES W. WHITNEY

Attorney for Defendant
GEORGIA POWER COMPANY

Of Counsel:

TROUTMAN, SANDERS,
LOCKERMAN & ASHMORE
1400 Candler Building
Atlanta, Georgia 30303
(404) 658-8000

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT upon Penelope W. Rumsey, Novy & Rumsey, 232 Candler Building, 127 Peachtree Street, N.E., Atlanta, Georgia 30303, by forwarding same through the United States Mail in a properly addressed envelope with sufficient postage attached thereto.

This the 5th day of March, 1979.

/s/ Melvin Radowitz
MELVIN RADOWITZ

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File
No. 693569

ROBERT C. JONES,
Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, THOMAS D. ARCHER and GEORGIA POWER COMPANY,
Defendants, Jointly and Individually.

Filed in Office
Jan. 19 1979
Deputy Clerk State Court
Fulton County, GA

ANSWER OF DEFENDANT LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS

NOW COMES one of the Defendants, LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, and files this, its Answer to the Plaintiff's Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim against this Defendant upon which relief can be granted.

SECOND DEFENSE

Any claim that the Plaintiff may have against this Defendant is apparently based upon an alleged violation of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A)(B) or what is more commonly known as the NLRA Section 8(b)(1)(A)(B). The National Labor Relations Board has primary jurisdiction

of the alleged complaint of the Plaintiff in this matter, and the Plaintiff has already filed an Unfair Labor Practice Charge under the above cited sections with the National Labor Relations Board on or about June 24th, 1978, alleging that this Defendant "caused and procured the discharge of the Plaintiff, and thereby coerced the Employer (Georgia Power Company) in the selection of its supervisors and bargaining representative, because said individual (Plaintiff) had not been a member in good standing of said Labor organization," as identified in Unfair Labor Practice Charge No. 10-CB-2905. The National Labor Relations Board, after completion of its investigation on or about July 19th, 1978, concluded that this Defendant had not engaged in any unlawful conduct regarding Plaintiff's status as a supervisor, and refused to issue a complaint. Therefore, the Plaintiff's claim is preempted by said applicable Federal Labor Law and the findings of the National Labor Relations Board are res judicata as to all claims raised by the Plaintiff's Complaint, the Plaintiff not having filed his appeal to the National Labor Relations Board in Washington, D.C., as of August 1st, 1978.

THIRD DEFENSE

COUNT I

1.

This Defendant admits the allegations of Paragraph 1 of the Plaintiff's Complaint.

2.

Defendant admits that THOMAS D. ARCHER is the Business Agent of Local 926 and is a resident of the State of Georgia, but denies the remainder of the allegations in said Paragraph 2 of Plaintiff's Complaint.

3.

Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of said allegations of Paragraph 3 of the Plaintiff's Complaint, and can neither admit nor deny same.

4.

Answering the allegations of Paragraph 4 of Plaintiff's Complaint this Defendant denies same as pled, and show that Plaintiff was initiated on February 12th, 1970, into Local 926, and was suspended in February of 1975, from said Local 926 for non-payment of dues.

5.

Answering the allegations of Paragraph 5 of Plaintiff's Complaint, this Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of said allegations, and can neither admit nor deny same, and demands strict proof thereof.

6.

Answering the allegations of Paragraph 6 of Plaintiff's Complaint, this Defendant denies same in its entirety, and further shows that neither Defendant ARCHER nor any other officer or agent of Defendant LOCAL 926 intimidated or coerced the Defendant GEORGIA POWER COMPANY into breaching any employment contract with the Plaintiff or any other person.

7.

Answering the allegations of Paragraph 7 of the Plaintiff's Complaint, this Defendant shows that it is without knowledge or information sufficient to form a belief as to the truth of said allegations, and can neither admit nor deny same, but demands strict proof thereof.

8.

Answering the allegations of Paragraph 8 of the Plaintiff's Complaint, this Defendant denies same in its entirety, and demands strict proof thereof.

COUNT II

9.

Answering the allegations of Paragraph 9 of Plaintiff's Complaint, this Defendant herein incorporates its answers and responses to the allegations contained in Paragraphs 1 through 8 of the Plaintiff's Complaint as set forth hereinabove.

10.

Answering the allegations of Paragraph 10 of the Plaintiff's Complaint, this Defendant states that it is without knowledge or information sufficient to form a belief as to the truth thereof and can neither admit nor deny same, but demands strict proof thereof.

WHEREFORE, having fully answered, Defendant LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS prays that the Plaintiff's Complaint herein be dismissed and that this Defendant be discharged with all costs and attorney's fees taxed against the Plaintiff, and for such other and further relief as this Court deems just and proper.

/s/ Harris Jacobs

HARRIS JACOBS

/s/ Melvin Radowitz

MELVIN RADOWITZ

Attorneys for LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS

JACOBS, JACOBS & DAVIS
707 Healey Building
Atlanta, Georgia 30303

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing ANSWER upon Eugene Novy, Esquire, Novy & Rumsey, 232 Candler Building, 127 Peachtree Street, N.E., Atlanta, Georgia 30303, by forwarding same through the United States Mail in a properly addressed envelope with sufficient postage attached thereto.

This 19th day of January, 1979.

/s/ Melvin Radowitz

MELVIN RADOWITZ

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File
No. 693569

ROBERT C. JONES,
Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, THOMAS D. ARCHER and GEORGIA POWER COMPANY,
Defendants, Jointly and Individually.

Filed in Office
Jan. 19 1979
Deputy Clerk State Court
Fulton County, GA

ANSWER OF DEFENDANT THOMAS D. ARCHER

NOW COMES one of the Defendants, THOMAS D. ARCHER, and files this, his Answer to the Plaintiff's Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim against this Defendant upon which relief can be granted.

SECOND DEFENSE

Any claim that the Plaintiff may have against this Defendant is apparently based upon an alleged violation of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A)(B) or what is more commonly known as the NLRA Section 8(b)(1)(A)(B). The National Labor Relations Board has primary jurisdiction of the alleged complaint of the Plaintiff in this matter, and the Plaintiff has already filed an Unfair Labor Practice Charge

under the above cited sections with the National Labor Relations Board on or about June 24th, 1978, alleging that this Defendant "caused and procured the discharge of the Plaintiff, and thereby coerced the Employer (Georgia Power Company) in the selection of its supervisors and bargaining representative, because said individual (Plaintiff) had not been a member in good standing of said Labor organization," as identified in Unfair Labor Practice Charge No. 10-CB-2905. The National Labor Relations Board, after completion of its investigation on or about July 19th, 1978, concluded that this Defendant had not engaged in any unlawful conduct regarding Plaintiff's status as a supervisor, and refused to issue a complaint. Therefore, the Plaintiff's claim is preempted by said applicable Federal Labor Law and the findings of the National Labor Relations Board are res judicata as to all claims raised by the Plaintiff'sComplaint, the Plaintiff not having filed his appeal to the National Labor Relations Board in Washington, D.C., as of August 1st, 1978.

THIRD DEFENSE

COUNT I

1.

This Defendant admits the allegations of Paragraph 1 of the Plaintiff's Complaint.

2.

This Defendant admits that he is the Business Agent and Representative of LOCAL 926 and is a resident of the State of Georgia; however, this Defendant states that he is not subject to the jurisdiction of this Court as he is a resident of Cobb County, Georgia, residing at 3906 Flags Road, Mableton, Cobb County, Georgia, and has resided for the last 29 years.

3.

Defendant states that he is without knowledge or information sufficient to form a belief as to the truth of said allegations of Paragraph 3 of the Plaintiff's Complaint, and can neither admit not deny same.

4.

Answering the allegations of Paragraph 4 of Plaintiff's Complaint this Defendant denies same as pled, and shows that Plaintiff was initiated on February 12th, 1970, into Local 926, and was suspended in February of 1975, from said Local 926 for non-payment of dues.

5.

Answering the allegations of Paragraph 5 of Plaintiff's Complaint, this Defendant states that he is without knowledge or information sufficient to form a belief as to the truth of said allegations, and can neither admit nor deny same, and demands strict proof thereof.

6.

Answering the allegations of Paragraph 6 of Plaintiff's Complaint, this Defendant emphatically denies same in its entirety, and further shows that neither Defendant ARCHER nor any other officer or agent of Defendant LOCAL 926 intimidated or coerced the Defendant GEORGIA POWER COMPANY into breaching any alleged employment contract with the Plaintiff or any other person.

7.

Answering the allegations of Paragraph 7 of the Plaintiff's Complaint, this Defendant shows that he is without knowledge or information sufficient to form a belief as to the truth of said allegations, and can neither admit nor deny same, but demands strict proof thereof.

8.

Answering the allegations of Paragraph 8 of the Plaintiff's Complaint, this Defendant denies same in its entirety, and demands strict proof thereof, and further states he is not indebted to the Plaintiff in any amount prayed for.

COUNT II

9.

Answering the allegations of Paragraph 9 of Plaintiff's Complaint, this Defendant herein incorporates its answers and responses to the allegations contained in Paragraphs 1 through 8 of the Plaintiff's Complaint as set forth hereinabove.

10.

Answering the allegations of Paragraph 10 of the Plaintiff's Complaint, this Defendant states that he is without knowledge or information sufficient to form a belief as to the truth thereof and can neither admit nor deny same, but demands strict proof thereof.

WHEREFORE, having fully answered, Defendant THOMAS D. ARCHER prays that the Plaintiff's Complaint herein be dismissed and that this Defendant be discharged with all costs and attorney's fees taxed against the Plaintiff, and for such other and further relief as this Court deems just and proper.

/s/ Harris Jacobs

HARRIS JACOBS

/s/ Melvin Radowitz

MELVIN RADOWITZ

Attorneys for LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS

JACOBS, JACOBS & DAVIS
707 Healey Building
Atlanta, Georgia 30303
(404) 522-4280

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing ANSWER of Defendant THOMAS D. ARCHER, upon Eugene Novy, Esquire, Novy & Rumsey, 232 Candler Building, 127 Peachtree Street, N.E., Atlanta, Georgia 30303, by forwarding same through the United States Mail in a properly addressed envelope with sufficient postage attached thereto.

This 19th day of January, 1979.

/s/ Melvin Radowitz

MELVIN RADOWITZ

IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

Civil Action File
No. 693569

ROBERT C. JONES,
Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, THOMAS D. ARCHER and GEORGIA POWER COMPANY,
Defendants, Jointly and Individually.

Filed in Office
Jan. 19 1979
Deputy Clerk State Court
Fulton County, GA

ANSWER

COMES NOW Defendant Georgia Power Company ("Defendant"), and files this its ANSWER to the Plaintiff's Complaint and shows the Court as follows:

FIRST DEFENSE

The Plaintiff's Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

Any alleged employment agreement referred to in Plaintiff's Complaint herein is void for want of any consideration whatsoever.

THIRD DEFENSE

Plaintiff was not an employee of Defendant, and any individual who purported to enter into an employment agreement as between Plaintiff and Defendant Georgia Power Company did not have authority from Defendant to enter into said agreement.

FOURTH DEFENSE

Any claim that the Plaintiff may have against Defendant is based upon an alleged violation of federal labor laws, to wit: 29 U.S.C. § 158(b). The primary jurisdiction of the National Labor Relations Board has been recognized by the Plaintiff, who has already processed a charge with this Board based upon the exact claim set forth in Plaintiff's Complaint. The Board has concluded its processing of Plaintiff's charge with a determination adverse to the Plaintiff. As such, Plaintiff's claim is preempted by applicable federal labor law and the findings of the National Labor Relations Board are res judicata as to all claims raised by Plaintiff's instant complaint.

FIFTH DEFENSE

Georgia Power Company is a regulated public utility, and, as such, its officers and agents had a duty and privilege of ensuring that construction of its Plant Scherer project was completed in a timely and efficient manner. All actions taken by Defendant Georgia Power Company in regard to the Plaintiff were in furtherance of this duty and privilege.

SIXTH DEFENSE

Any and all actions taken by Georgia Power Company, its officers and its agents, were taken in good faith in an effort to ensure that Plant Scherer would be built as inexpensively as possible and in accordance with all applicable laws.

SEVENTH DEFENSE

Any employment agreement relied upon by Plaintiff is an oral agreement, void and unenforceable by reason of the statute of frauds.

EIGHTH DEFENSE

ANSWER TO COUNT ONE

1.

Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 1 and 2 of Plaintiff's Complaint herein.

2.

Defendant admits the allegations contained in Paragraph 3 of Plaintiff's Complaint herein.

3.

Defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraph 4 of Plaintiff's Complaint herein.

4.

Defendant denies the allegations contained in Paragraphs 5, 6, 7, and 8 of Plaintiff's Complaint herein.

ANSWER TO COUNT TWO

5.

In response to Paragraph 9 of Plaintiff's Complaint, Defendant herein incorporates its answers and responses to the allegations contained in Paragraphs 1 through 8 of Plaintiff's Complaint herein, as set forth above.

6.

Defendant denies the allegations contained in Paragraph 10 of Plaintiff's Complaint herein and expressly denies that it took any action in regard to Plaintiff based upon Plaintiff's membership or non-membership in any labor organization.

WHEREFORE, Defendant prays that Plaintiff's Complaint herein be dismissed, that Plaintiff take nothing, that all costs

and attorneys' fees be taxed against the Plaintiff, and for such other and further relief as this Court deems just and proper.

/s/ Michael C. Murphy
MICHAEL C. MURPHY

/s/ Charles W. Whitney
CHARLES W. WHITNEY

Attorneys for Defendant
GEORGIA POWER COMPANY

Of Counsel:

TROUTMAN, SANDERS, LOCKERMAN & ASHMORE
1400 Candler Building
Atlanta, Georgia 30303
(404) 658-8000

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing ANSWER upon Eugene Novy, Esquire, Novy & Rumsey, 232 Candler Building, 127 Peachtree Street, N.E., Atlanta, Georgia 30303, by forwarding same through the United States Mail in a properly addressed envelope with sufficient postage attached thereto.

This the 18th day of January, 1979.

/s/ Charles Whitney
CHARLES W. WHITNEY

IN THE STATE COURT FOR THE
COUNTY OF FULTON
STATE OF GEORGIA

Civil Action File
No. 693569

ROBERT C. JONES,

Plaintiff,

v.

LOCAL 926 OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, THOMAS D. ARCHER and GEORGIA POWER COMPANY,

Defendants, Jointly and Individually.

Deposition of ROBERT C. JONES, taken on behalf of the Defendants, pursuant to agreement of counsel and in accordance with the Georgia Civil Practice Act, before Victoria S. Warren, Certified Court Reporter and Notary Public, at 1300 The Candler Building, Atlanta, Georgia, on the 20th day of February, 1979, commencing at the hour of 1:30 p.m.

[2] APPEARANCES OF COUNSEL:

On behalf of the Plaintiff: EUGENE NOVY, Esq.
MS. PENELOPE W. RUMSEY

On behalf of the Defendant
Georgia Power Company: CHARLES W. WHITNEY, Esq.
PATRICK K. WIGGINS, Esq.

On behalf of the Defendant
Local 926 of the International Union of
Operating Engineers: HARRIS JACOBS, Esq.

Also Present: Mrs. Robert C. Jones

MR. WHITNEY: Let the record reflect this is the deposition of Mr. Robert C. Jones, taken by stipulation and agreement of counsel, for all purposes permissible under Georgia Practice.

Mr. Jones, have you had a chance to discuss your right to sign the deposition with your attorney?

MR. NOVY: Yes; we would like to have signature.

(Thereupon, the reading and signing of the deposition by the witness was reserved, the original being sent to Mr. Eugene Novy.)

MR. WHITNEY: We will reserve objections except as to the form of the question and responsiveness of the answer until time of [3] trial.

ROBERT C. JONES,
being first duly sworn, was examined and deposed as follows:

CROSS-EXAMINATION

BY MR. WHITNEY:

Q. Mr. Jones, my name is Chuck Whitney. I am an attorney, and I represent the Georgia Power Company.

I am going to ask your indulgence today; I have a terrible sinus problem, and it's draining on me.

Mr. Jones, have you ever given a deposition before in a legal proceeding before?

A. No, sir, I haven't.

Q. Mr. Jones, we are here today to get some information. I am not going to try to trick you or fool you. I am going to keep my questions straightforward so that they are easily understood. If I don't do that, I want you to let me know that you don't understand the question or rephrase it. Okay?

A. Okay.

Q. Would you please state your full name for the record?

A. Robert C. Jones.

Q. Mr. Jones, what's your current home address?

A. 2954 Orchard Lane, S.E., Atlanta, Georgia.

[4] Q. What is the zip code?

A. 30354.

Q. How long have you lived there?

A. Roughly eight years.

Q. Where did you—

A. Seven or eight years.

Q. Where did you live before that?

A. I lived in an apartment down on 41-19, Brentwood Apartment, I believe.

Q. Is that in Atlanta?

A. Yes, sir, uh-huh.

Q. And how long did you live in those apartments?

A. Oh, probably a year and a half, two years.

Q. You are married, that's correct?

A. Yes, sir.

Q. How long have you been married?

A. Seven years.

Q. Any children?

A. I don't have any by my wife now; she has two.

Q. Have you adopted those children?

A. No, sir.

Q. Are they living with you?

A. Yes, sir.

Q. How old are those children, Mr. Jones?

[5] A. Seventeen and eleven.

Q. Are they both in school?

A. Yes, sir.

Q. How old are you, Mr. Jones?

A. Forty-six.

Q. Mr. Jones, did you graduate from high school?

A. No, sir, I didn't.

Q. Did you attend high school?

A. I went some, and then I—after I went in the Army—I went on through the tenth grade in the Army.

Q. Did you start high school before going into the service?

A. Seemed like I just started maybe in the ninth grade or something in the elementary school before I went.

Q. Where was that? Do you recall?

A. Marblehill, Georgia.

Q. Marblehill?

A. Right.

Q. When did you go into the service, Mr. Jones?

A. 1952.

Q. Were you drafted or did you enlist?

A. No; I was drafted.

[6] Q. How long were you in the service?

A. Two years.

Q. What did you do in the Army, Mr. Jones?

A. I was in the engineers.

Q. Regular engineers?

A. Sir?

MR. WHITNEY: Off the record.

Back on the record.

Q. (By Mr. Whitney) Regular engineers or combat engineers?

A. Well, I was in the 509th engineers, and we was in combat.

Q. Was that in Korea?

A. Yes, sir.

Q. How long were you in Korea, Mr. Jones?

A. About eleven months.

Q. What was your rank when you were discharged?

A. Sergeant first class.

Q. And, specifically, what type of work did you do with the engineers while you were in the service?

A. Well, we was working on the roads, and then I went into the battalion ammo dump and handled all the ammunition.

That comes under headquarters company.

Q. When were you discharged?

[7] A. Oh, I believe it was billed twenty-one months, and by going to Korea, you got three months knocked off—some time early part—last part of '54 I guess.

Q. And what type of discharge did you receive?

A. Honorable discharge.

Q. Where were you discharged?

A. Fort Benning, Georgia.

Q. What did you do then, Mr. Jones?

A. I went back to running bulldozers, which I had been doing before I went in the Army.

Q. Who were you working for? Do you remember?

A. T. L. Harris.

Q. T. L. Harris?

A. T. L. Harris, Ball Ground, Georgia.

Q. What were you doing for him?

A. Operating the bulldozer.

MR. WHITNEY: Let's go off.

Back on the record.

Q. (By Mr. Whitney) How long did you work for Mr. T. L. Harris?

A. Oh, I would say three to four years, somewhere in that neighborhood.

Q. That would have been up until 1957 or eight?

A. Yes.

[8] Q. What did you do then?

A. I went to work over at General Motors.

Q. Where was that?

A. Doraville, Georgia.

At that time, it was B.O.P.

Q. At that time it was B.O.P.? I am sorry, what was that?

A. At that time it was B.O.P., Buick, Oldsmobile, and Pontiac.

Q. What were you doing there?

A. Welding.

Q. Did you know how to weld before you went to work at General Motors or did they train you?

A. No, sir, I knew how.

Q. Where did you learn how to weld?

A. I just took it up around a little old shop, kindly welding around after school, first thing and another.

Q. Where was that shop? You mean you had your own shop?

A. No, sir. A friend I had had one, and I would look after it some for him when he would have to go out on the road, and he got to letting me weld, so I became a welder.

Q. Okay. Was this part-time while you were [9] working for T. L. Harris?

A. No; just when I was around that shop. It was back in my school days, really.

Q. Before you went into the service?

A. Right.

Q. Okay. Did you do any welding at all while you worked for T. L. Harris?

A. Oh, yes, uh-huh.

Q. So, you went to work as a welder at the GM plant in Doraville in 1957 or '58?

A. Yes.

Q. When you were working at General Motors, were you a member of any union at General Motors?

A. Yes, sir.

Q. What union was that?

A. I don't remember right offhand. It's—really don't know what the name of it was, but I was a member of—

Q. Do you remember when you joined the union at General Motors?

A. Just as soon as I come available to it—that it came available for me to join.

Q. Let me back you up.

When you were working for T. L. Harris, did you belong to any union?

[10] A. No, sir.

Q. Was the union that you had joined at General Motors the first union that you had ever joined?

A. I would say yes, sir.

Q. How long did you work at General Motors?

A. About three years.

Q. That would have taken us up to around 1961, '62?

A. Yes.

Q. Where did you go then?

A. Went to Ingram Trucking Company.

Q. Ingram, I-n-g-r-a-m?

A. Yeah.

Q. What did you do at Ingram Trucking?

A. Welding, drove a truck some.

Q. Why did you leave General Motors, Mr. Jones?

A. It was due to the layoffs. They had a layoff, you know, every body change and all. Actually, you got to work about three or four months out of the year, and I just got tired of it.

Q. Where was Ingram Trucking?

A. Ball Ground, Georgia.

Q. While you were working at Ingram, did you belong to any union?

A. No, sir, I didn't.

[11] Q. How long did you work for Ingram?

A. Oh, I would say probably a year, year and a half.

Q. Why did you leave Ingram?

A. Not enough money.

Q. Who was your supervisor there at Ingram?

A. Well, there was two of them, really. It was Cecil Ingram hisself and his son, Fred L. Ingram—father-and-son deal.

Q. And how long did you say you worked there?

A. Oh, probably a year and a half, something in that neighborhood.

Q. And then where did you go to work? Do you remember?

A. No, I don't. Seems like I went to work at Lockheed, Lockheed Georgia Company.

Q. Lockheed?

A. Yes, sir.

Q. Now, this takes us up to somewhere around 1964?

A. Yes.

Q. What did you do at Lockheed?

A. Welding.

Q. Were you hired as a welder at Lockheed?

A. Yes, sir.

[12] Q. Were you a member of a union while you were at Lockheed?

A. Yes, sir.

Q. Do you remember what union that was?

A. Oh, something machinists—I am not really sure—709 something about machinists, I think.

Q. Do you remember how long you worked at Lockheed before you joined that union?

A. When the—just like the others, just as soon as the time come provided for me to join, 90 days.

Q. How long did you work at Lockheed?

A. Left about '65, maybe a little longer.

Q. About a year?

A. Year and a half.

Q. Year, give or take, to the best of your memory?

A. I would say year and a half, I believe.

Q. Why did you leave Lockheed?

A. I went in business for myself and bought out a service station.

Q. Where was that service station?

A. Ball Ground, Georgia.

Q. What type of service station was it?

A. Standard.

Q. Did you have any other work while you owned [13] that service station?

A. Well, I was doing mechanical work, just working for myself around the station.

Q. Mechanical work and stuff like that, auto repairs?

A. Yes.

Q. How long did you run the service station, Mr. Jones?

A. Oh, about fourteen months, I guess.

Q. During that—

A. Twelve or fourteen months.

Q. During that fourteen months, did you belong to any union?

A. No, sir, I didn't.

Q. Did you have any employees working for you at that service station?

A. Yes, sir, I did.

Q. Did they belong to any unions?

A. No.

Q. Did you sell the service station—

A. Yes, sir.

Q. —at the end of that time?

A. No. I just closed it up and—well, when I lost all my money, I locked the doors.

Q. You went out of business?

[14] A. Yes, sir.

Q. Then what did you do?

A. That's when I opened up a welding shop at Jasper, I believe.

Q. What type of shop?

A. Welding shop.

Q. Okay. Were you in business for yourself again?

A. Yes, sir.

Q. Did you have any employees working for you at that time?

A. Yes, sir, I did.

Q. Did you belong to any union while you had the welding shop?

A. No, sir.

Q. Did your employees belong to any union welding shop?

A. No, sir.

Q. How long did you run that welding shop?

A. Hmm, something like a year, I imagine.

Q. About a year, you say?

A. Yes, sir.

Q. What did you do with the welding shop? Did you close it or sell it?

A. Yes, sir, I closed it.

Q. Why did you close it?

[15] A. Well, really didn't have enough business to keep it busy, a lot of overhead.

Q. Then what did you do?

A. That's about the same time I started trying to get in the Operating Engineers.

Q. How did you start?

A. Through some friends that was in the Operating Engineers.

Q. Who were those friends, Mr. Jones? Do you recall?

A. James Garrett, up at Acworth, and Robert something—I forgot what his last name is— couple of guys that I know that lived over at Acworth.

Q. How did they go about getting you in the Operating Engineers? Do you remember?

A. Well, they had seen some of my work and thought I ought to be in the Operating Engineers, said they would talk to he man for me, which they did; I got in.

Q. You got into the union?

A. Yes, sir.

Q. But did you join the union before you were actually working on a project or job anywhere?

A. Oh, yes. Yeah. I joined the union before I ever even thought about going out on a job.

[16] Q. You mentioned that your friends were going to talk to the man, do you recall who they were referring to?

A. T. D. Archer, he is a business agent at Local 926.

Q. Did you yourself talk to Mr. Archer?

A. Yes, sir, I did.

Q. And you told him you wanted to join the union, correct?

A. Right.

Q. And what did he tell you? Do you recall?

A. Well, I believe I came down and talked with him one time, and then he told me to come back in a few days—I forget—a week or so, so I went back and talked with him, and he give me a book.

Q. Did any money change hands? Did you pay any dues—

A. Oh, yes.

Q. —any fees? Do you remember how much?

A. Initially, I believe it was—at that time, I was getting a B book. I think it was seventy-five dollars, I believe.

Q. That would have been back in May?

A. That's about right.

[17] Q. You joined in about 1968?

A. Yes, sir.

Q. Do you recall what your first job was as a member of the Operating Engineers?

A. I believe the first job I went on was out at GNA Contractors out at Ben Hill, Georgia.

Q. What was your job out there?

A. Well, I was mechanic and welder and was about anything they had to do.

Q. And do you recall how you got that particular job?

A. Well, I walked—when I went in the hall, Mr. Archer told me to go out there.

Q. Where was the hall at that time?

A. I believe it was on Stewart Avenue.

Q. Here in Atlanta?

A. Yes, sir.

Q. Okay. When you went out there, you were hired, correct?

A. Yes, sir. Well, they had a request for a man, and he sent me out there to fill the request.

Q. How long was this after you joined the union? Do you recall?

A. Oh, I think it was probably the same day I went down and got my book.

[18] Q. And how long did you work there?

A. I would say around two—two years, somewhere in the neighborhood of two years.

Q. Through 1970, approximately?

A. Something like that, yeah.

Q. Then what happened with that job?

A. They went out of business and kindly closed up.

Q. Who was your supervisor on that job?

A. Rupert Kennedy was the master mechanic.

Q. Kennedy?

A. Yes, sir.

Q. Was there a shop steward or union representative on that job?

A. No, I don't believe there was, not to my knowledge.

Q. Okay. When that company went out of business, where did you go to work?

A. I went to J. Scott Crane Rental in Atlanta.

Q. How long were you out of work, do you remember, between that time—

A. Oh—

Q. —and you went to Scott Crane?

A. Just a matter of a few days, just—maybe probably less than a week.

[19] Q. How did you find out about the job at Scott Crane?

A. I think I came back into the hall, and Tommy told—Mr. Archer told me to go out to J. Scott Rental.

MR. NOVY: Off the record.

Q. (By Mr. Whitney) What was your job at Scott Crane?

A. I was master mechanic, in other words, same as superintendent over all the men, over all the equipment.

Q. Now, when you started the job at Scott Crane, were you still a member of the Operating Engineers union?

A. Yes, sir.

Q. Had you continuously been a member since you first went down and got your card in 1968?

A. That's right.

Q. How long did you work for J. Scott Crane?

A. I don't know. I think about between three—three and four years, something like that.

Q. That would have taken us up to around 1974?

A. Yes, I would say, about—I think about '73 is when I left there, I believe.

Q. 1973.

[20] Why did you leave J. Scott Crane Rental?

A. They made other arrangements, too; they sold out some rigs and just kindly folded up, too.

Q. Who was your supervisor while you were at Scott Crane?

A. Grady Gable.

Q. Did you have a shop steward or union representative—

A. No, sir, I didn't.

Q. —down at J. Scott Crane?

A. No, I didn't.

These places—all your men was out in the field 90 percent of the time; you never hardly ever were together all at one time.

Q. Maybe you better go into that a little bit so we know how it worked.

You said you were a master mechanic, which was—

A. Yes.

Q. —the same as supervisor for J. Scott Crane?

A. That's right.

Q. How many people would you have working for you?

A. Oh, it would vary from time to time. I would say anywhere between twelve and eighteen.

[21] Q. And on a typical day, what type of things would these twelve or eighteen people be doing?

A. Running equipment.

Q. These were the actual operators?

A. Operator and all.
You have two men to the big cranes and one to the smaller ones.

Q. To make sure I understand it, J. Scott Crane would rent out a crane or a piece of equipment with the operator—

A. That's right.

Q. —mechanic, welder?

A. Right.

Q. Okay. So, the people that worked for you would be disbursed to different job sites?

A. Yes, sir, all over Atlanta, everywhere.

Q. Were all the people that worked for you at J. Scott Crane members of the union?

A. Yes, sir.

Q. You said 1973, maybe 1974, Scott Crane went out of business, correct?

A. Something. I would rather think—I think about '73, something like that.

Q. At that time you were still a member of the union?

[22] A. Yes, sir, sure was.

Q. Where did you go to work after J. Scott Crane went out of business?

A. Well, I—for a couple of three weeks there, I picked up—they sent me out on little jobs, you know, just little two or three-day jobs around town.

Q. Who was, "they?"

A. The union.

Q. You would go down to the union hall every day?

A. Right; or they would either call me and tell me to go a certain place and give me a two or three-day job.

That rocked on a while.

Q. About how long did that continue? Do you recall?

A. I would say until somewhere around mid '73, something like that.

Q. Okay. And what happened then in mid 1973?

A. Well, I had to—had an operation. I had to go to the hospital, and I was out of work there about four months.

Q. Okay. That takes us close to the end of 1973 then?

A. Yes, sir.

[23] Q. And, then, physically were you able to go back to work at that time?

A. Yes, sir, I was ready to go back to work.

Q. Did you go back down to the union hall?

A. Yes, sir, I did.

Q. Who did you talk to down there? Do you recall?

A. T. D. Archer

Q. Is that the same Mr. Archer you talked to back when you first joined the union?

A. Yes, that's right.

Q. Were you able to find permanent employment there?

A. I was able to find not any.

Q. There wasn't any work at all?

A. No—well, I didn't find any.

Q. How long were you out of work?

A. Well, at that particular time, when I had my operation, I was out for about four months; and, then, finally, I went down to Ralston Purina and run a little old rig for about a month, maybe a month and a half.

Q. Okay. How did you get that job? Did the union send you to Ralston Purina?

A. Yes, the union sent me on that job.

Q. Then what happened? Do you recall?

[24] A. So, that job played out, and I was out of work for five months then.

Q. When that Ralston Purina job played out, you mean the job finished?

A. That's right.

Q. Everyone left, there wasn't any more work there?

A. The rig that I was running left; when it leaves, the operator goes, too.

Q. Then you were out of work, you said, for five months?

A. Yes, sir.

Q. Then what happened?

A. Well, I was talking to a friend of mine up at home that told me his brother was working for Nelson & Budd up at Chamblee, and he said his brother had quit over there in the shop. He was working in the shop welding and mechanicing, first one thing and another, and he said, "If you will go over there and talk to Lynn Stevens, he would probably put you to work," which I did.

I went up on Monday, I think, and talked to Lynn Stevens, and he said, "Yeah, I would like for you to go to work right now." Which their operators now on their front end loaders, dozers, drag lines, so forth, is union, but there shop help and their truck drivers is [25] nonunion—which I was going in the shop. So, he wanted me to go to work, and I told him I would call him—I would try to get back to him next morning. So, I come back in, and I called T. D. Archer, the business agent down at 926, and I told him I had the job. And he said, "No, I think I have got men sitting on the book that's welding mechanics." Said, "I will man that job myself." So, I said, "Okay. If that's the way you feel about it, why I am going to work."

Q. And did you go to work there?

A. No, sir, I didn't.

Q. Did you ever go back there?

A. No, sir, I didn't.

Q. Did you know if that job was ever filled?

A. Well, apparently he filled it. He said he could man it, so that's evidently—that's what he meant, he had a man sitting there that he would put on it.

Q. Did anybody from the company ever get in touch with you again?

A. No, sir, they didn't.

Q. You never heard from Lynn Stevens again?

A. No, sir.

Q. Okay. You were still out of work. What did you do?

[26] A. That's right. Well, like I told him, I was going to work, so the next day, I loaded up my tool box and went to Plant Wansley down at what we call the yellow dirt. I guess you know it by that, too. Everybody calls it—Plant Wansley down in Heard County.

My wife and I got in the pickup and went down there. I had never been to the job before in my life. I had worked at Plant Yates, but I never had worked at Plant Wansley. So, I went down and filled out the applications, and Quill Stevens called the superintendent at the maintenance shop, and he came up—

Q. Who called?

A. Quill Stevens, the employment guy down there that done the hiring down at the main gate.

So, Mr. Percival came up and talked with me, and he wanted me to go to work right then, about 11:00 in the morning.

Q. Who was Mr. Percival working for at the time?

A. Daniels Construction.

Q. That would have been a job with Daniels then?

A. Right.

Q. And this was a Georgia Power Company project?

A. That's right, Plant Wansley.

Q. He offered you a job and said to come back the next morning?

[27] A. No, sir; he wanted me to go to work right then, and I told him I couldn't, I had to bring my wife home, but I said I would be back in the morning. So, I went back and stayed up there until June 9th, 1978.

Q. So, that takes us to 1974 through 1978, working for Danieis Construction?

A. Right.

Q. Now when you went—well, first let me back you up.

You mentioned that you worked at Plant Yates prior to going—

A. That was during the time that I was working for J. Scott Rental. I was everywhere, I would say. I had worked at Plant Yates, and I had never been over to Plant Wansley. We had cranes going in and out of all these jobs.

Q. On a short-term rental type basis?

A. Right, right.

Q. How would that work? Would the contractor call J. Scott and say, "I need a piece of equipment"?

A. Right. "I want a crane for a minimum of six hours," or, "I want one for six weeks or three weeks or the duration of the job," or whatnot. I mean, the rates went different all the way through. See?

Q. Now, at the time you went to Plant Wansley [28] and applied for that job, were you a member of the Operating Engineers union?

A. Well, I figured I was a member up until I talked to Tommy Archer that day after I went up to Nelson & Budd.

Q. Let me clarify this.

What day did you talk to Tommy Archer?

A. I don't really know the specific date on it, but—

Q. You said—

A. —it was the day before—

Q. Nelson & Budd, who is Nelson & Budd?

A. That's the one up at Chamblee.

Q. Okay. I am sorry.

A. I talked to Tommy Archer the day before I went to work at Plant Wansley.

Q. And that was the day you called him on the phone and told him you were going to go to work for Lynn Stevens, correct?

A. No, sir. I told im I was going to go to work; I didn't call any names. I told him I was going to go to work.

Lynn Stevens is the guy that hired you at Plant Wansley; he was personnel.

Q. Lynn Stevens was personnel at Wansley?

[29] A. Right; he was the one that did the hiring at Plant Wansley, Quill Stevens. Lynn Stevens is the one at Nelson & Budd.

Q. Okay. That's what happened.

So, Quill Stevens is at Wansley; Lynn Stevens is at Nelson & Budd.

A. Lynn, Lynn.

Q. Bear with me, Mr. Jones.

A. Go right ahead.

Q. Okay. When you went to work for Daniels Construction at the Georgia Power Company Plant Wansley project, was there any discussion at all about your union status?

A. No.

Q. Did anybody ask you if you were a union member?

A. Not that I remember.

Q. Now, earlier I had asked you if on the date you went down there and applied for that job you were a member of the union.

A. That's right.

Q. And I think you said you thought you were; am I correct?

A. No, sir. I said I was until I talked to Tommy Archer the day before I went down there.

[30] Q. Okay. When you talked to Tommy Archer the day before going to Plant Wansley, did you resign from the union?

A. No, sir, I didn't.

Q. Did you consider yourself a union member when you went down to Plant Wansley?

A. Well, as far as I know, I was still a member, but when they don't furnish you work, well, you don't need to be a member.

Q. During that four-year period that you worked for Daniels Construction, did you continue to be a union member?

A. No, sir, I didn't.

Q. Did you quit?

A. Sir?

Q. Did you quit the union?

A. I didn't—I went to work for Daniels. I haven't been back to the union. I have talked to Archer a time or two since then, but I have—as far as I am concerned, at that point, why he done had me shut out when I went to Daniels—I have learned now; I didn't know it then.

Q. So, as I understand it, you didn't tell anybody that you were resigning, you just went to work for Daniels and went about your own business?

[31] A. Right.

Q. Up until the time you went to work for Daniels, were you making dues payments to any union?

A. Yes, sir.

Q. To the Operating Engineers?

A. Well, up to this five months that I was out of work. At one time, I called Tommy Archer and told him I was to be late on my dues, and he said, "It's okay, because I have plenty of men that way." This was in '73. This was when the work slack was really a boom around here, and he said he had plenty of people in the same position, not to worry about it.

Q. So, from the time you were laid off then until the time you went to work for Daniels, you didn't make any dues payments?

A. No, sir, I didn't.

Q. After you went to work for Daniels, you never made another dues payment after that?

A. No, sir, I didn't.

Q. Did you ever receive any correspondence from the union—

A. No, sir.

Q. —telling you that you were no longer a member?

A. No, sir.

[32] Q. Did anybody from the union ever call you or tell you that you were no longer—

A. No, sir.

Q. —a member.

Okay. What did you do for Daniels Construction?

A. I was—I hired in as heavy duty mechanic on cranes; that covered the whole thing.

Q. That was your first job?

A. Yes, sir.

Q. Any promotions during that four years that you worked for Daniels?

A. Yes, sir.

Q. What were you promoted to from heavy duty mechanic?

A. Well, I was working in the shop as heavy duty mechanic, and, of course, I had plenty of experience with equipment, and they was about to run me to death. So, due to the fact that I thought I was being overworked and being sent out of the shop all the time and having to furnish my own tools and everything—this 4000 Manitowoc came open—

Q. I am sorry. The 4000 what?

A. 4000 Manitowoc crane.

Okay. I asked the equipment superintendent if I could have the job. He said, "I would like to have [33] you on it."

Q. Who was the equipment superintendent?

A. He was MacNab.

Q. Okay. That's his last name, MacNab?

A. He went by Mack. Everybody called him Mack, but MacNab is his name.

And he told me I could have it, but he couldn't hire me out from under my superintendent, Birchfield.

Q. Does MacNab work for Daniels, also?

A. Yes, sir.

Q. So, you would not be going to work for another company, it would be just an intracompany transfer?

A. It was a matter that—maybe ten cents an hour difference and plus a lot more overtime on the crane that I was making in the shop and just a lot better set up for me.

So, he told me if I would quit the shop for a week, he would hire me. So, I did. I quit. I went ahead and turned them in a notice.

Q. When was that?

A. Oh, I don't remember the—really the date.

Q. Do you remember about how long you had been working?

[34] A. Well, I was in the shop in about—I would say I stayed in the shop about three or four months—

Q. Okay.

A. —something like that.

So, I did quit. I told my shop foreman at that time that I was quitting, and they was going to get a raise and make the money right and all this good stuff, you know. And I told him when they got the raise to let me know and I would talk to them.

So, I went on the Manitowoc, the crane, for about, I would say, about three months.

Q. You were off work about a week—

A. Yes, sir.

Q. —when you quit?

A. Right.

Q. So, you were working for Daniels for one supervisor, you quit, and then you were hired by the other supervisor?

A. Right.

Q. Still working for Daniels?

A. Right.

Q. But this time as a crane operator?

A. Right.

Q. Ten cents an hour raise plus more overtime?

[35] A. Not a raise; there was about ten cents an hour difference in the money, I said, plus I would be getting more overtime and not having to furnish all my tools and that stuff.

Q. So, the job actually paid ten cents an hour less, the crane operator?

A. Right.

So, the reason for quitting was to keep the superintendents from getting at each others throats for you hiring my man and I want him back.

Q. Did it work?

A. Well, there wasn't anybody happy about it, but there wasn't anything that anybody could do about it.

So, anyway, I stayed on the crane about three months, then the project manager, Bird Ison, said for me to come down to the office. And, MacNab, my superintendent at that time, came down to the crane and told me that Bird wanted me, so we went down and talked to Mr. Bird Ison.

Q. That's Ison?

A. Ison. Anyway, it's a funny name.

So, we went down and talked with him, and he wanted me to go back in the shop as shop foreman. I asked him what the difference in money was, and he told me a dollar and thirty something cents an hour, I believe, [36] so I told him I would try it, providing him—I said—that superintendent didn't run me off to get revenge for leaving him. And he said, "He won't run you off." I said, "Okay. I will go."

Q. So, then you took the shop foreman's job?

A. Yes, sir, I took the shop foreman's job and stayed there about, I would say, another six, seven months probably.

Q. Okay.

A. So they paid me general foreman—

Q. Let me ask you this—let me back you up.

A. Yes, sir.

Q. When you went to work as crane operator for Mr. MacNab, was there any discussion regarding union membership?

A. No, sir, there wasn't any union on that job—well, the only union there was on the smokestack they was working on.

Q. How about when you went to work as shop foreman—

A. No, sir.

Q. —was there any discussion then?

A. No.

Q. You said you were shop foreman about six to seven months?

[37] A. And then—then they paid me general foreman—

Q. General foreman? Any discussion then regarding union membership?

A. No, sir.

Q. Okay. How long did you remain as general foreman on it?

A. I would say, oh, probably year to year and a half, I would say, in the neighborhood.

Q. And then what happened?

A. Well, then the superintendent—my superintendent was cutting a few corners and first thing and another, so they replaced him with me.

Q. So, you got another promotion?

A. Yes.

Q. What was your new title, superintendent?

A. Maintenance superintendent over all the equipment.

Q. Is that the job you held in June of 1978?

A. Yes, sir.

Q. Okay. How did you first hear about a job at the Georgia Power Company Plant Scherer project?

A. Well, I didn't really hear about the job, I just—like I say, I was in and out of Plant Yates down there, and they kept talking about yellow dirt. Yellow [38] dirt, it's just across the river. And, when you start getting hungry, well, you start looking.

Q. Let me put you in the right time sequence again, because I know this is confusing. I have taken you from childhood right up to June '78, and it's June '78 or April, I think you said in your complaint, 1978, that you learned about a potential job at Plant Scherer?

A. Yes, that's right.

Q. Which is a Georgia Power Company construction project at Plant Scherer?

A. Right.

Q. How did you first hear about that job?

A. Well, I knew the job was going on all this time, but still I had a guy to come on the job—on my job at Daniels, at Plant Wansley—Ronnie Ponseel approached me wanting to know if I would go down there as superintendent on their job.

Q. Did you know Ronnie Ponseel before he approached you?

A. Well, I knew him when I seen him, and I talked to him a lot on the phone, and—as far as knowing him, really I didn't know him.

Q. Why would you talk to him on the phone? How would that come up?

A. Well, a lot of times he would want something [39] done to his car or truck or whatever he was driving, and he would always call the shop, you know, or tell what he wanted done to it.

Q. Was Ponseel at one time working there at yellow dirt?

A. That's right. He was assistant—he was C. B. Head's assistant; C. B. was the project manager.

Q. Now, when Ponseel called you in the spring of '78, he was working at Plant Scherer, right?

A. No, sir, he was working at Plant Scherer, but he didn't call me; he was standing right in front of me.

Q. He came to see you?

A. He came to the job.

Q. Do you remember what he told you?

A. Yeah. He came up to me, and he said, "I have been talking with Leo Smith"—no—I can't even think of his name—anyway, he talked to some of the high officials down at the office about this job finishing up, and he wanted me to go to Plant Scherer over the equipment down there and asked me would I go. And, I said, "Well, you are—you got to show me some difference in the money, what the deal is on it." And he had it all wrote down on a piece of paper—told me what he would pay me.

[40] Q. How much was that?

A. He told me he would pay me eleven seventeen an hour, guaranteed forty hours a week, plus fifty dollars a week expense money, seven paid holidays, nine sick leave days, two weeks vacation after the first year.

Q. Okay.

A. That was for the duration of the job, and, you know, if I wasn't just mashed to death or something, why I would be there until the job was ended, the way I took—

Q. Did he tell you how long the job would last?

A. Eight to ten years and probably longr.

Q. When you say he had this written down, was it handwritten on a piece of paper—

A. Yeah.

Q. —or was it some type of printed—

A. I don't really know. He just pulled the paper out. I was in the crane, and he walked up to the front wheel of it and was talking to me.

Q. He read from it?

A. Yes.

Q. He didn't give you a copy?

A. No, he didn't. He read what it would be.

So, after I heard his information, I asked him how quick he wanted me to start, and he said, "I will [41] get back with you in a few days." Which he rocked around there a little while, and then he did come back by and talked to me again.

Q. Let's go ahead. He did come back to you after a couple of days?

A. Oh, it might have been a week or so.

Q. Did he?

A. It was some time—he came back—

Q. Did he personally come back down to Wansley on this seond trip?

A. Yes sir.

Q. What did he tell you on this second trip?

A. Well, at that time, when he came back, he said he was going to be in school for a couple weeks out at Emory University, that they had him going through some kind of big stuff out there, and he had to go to school for a couple weeks, but he

still—he wanted to get back to W. Penson, which, I think, was probably the manager of Plant Scherer, and see if they couldn't get it worked out for me to come on down there.

Q. Did he tell you when they would want you to start?

A. Well, I assumed that it was as soon as he could get me down there, the better off he thought he was.

[42] Q. Now, from your point of view at this time, when you were talking to Ronnie Ponseel, were all the details straightened out as far as you actually accepting employment at Plant Scherer?

A. Well, in my mind, for the money and the position and all that it was going to put me in, in my mind, everything was, I would say, pretty well straightened out.

Q. Did you actually tell Ponseel, "Yes, I will take the job, and I will start whenever you tell me"?

A. Well, they wanted me to come down for an interview, you know, and actually look the job project over and everything--

Q. Okay.

A. —and probably to look me over and—which I did later.

Q. Okay. Ponseel, after the second trip, told you what, that they would be back in touch with you?

A. Yes.

Q. Did he get back in touch with you?

A. Yes. He called me there, and it was probably two or three weeks after he went to that school and all. He called me, and he called Mack, too, down at the main office—Georgia Power office—and had Mack call me and told me to tell him to call him back or told Mack [43] for me to call him back.

Q. Did you call him back?

A. Yes, I did.

Q. What did he tell you at that time?

A. I think I called him—on a Monday, and it was real rainy that week, and I think I called him on Monday or Tuesday. And he asked me when could I come down. I said, "Well, how about Wednesday?" I told him, "Most any time." He said, "How about Wednesday?" I said, "Okay. I will be there."

Q. Did you go down on Wednesday?

A. So, Wednesday morning, why I told my field superintendent, Mike Browning, that I would be late coming in that morning. So, I went to Scherer instead of going to Plant Wansley. I went to Scherer and came back into work at Wansley at dinner.

Q. Was that morning the Wednesday morning you spent at Plant Scherer?

A. Right.

Q. Did you meet with Ronnie Ponseel that morning?

A. Yes, I did.

Q. Did you meet with anybody else on that morning?

A. Yes, I did.

Q. Do you recall who you met with?

[44] A. I met with Olin Heath. He took me out on the project, rode me around, showed me the—

Q. Do you recall what his position was?

A. No, not really. I think that he was working under Ronnie Ponseel or real close to him some way.

Q. Okay. Did you meet anybody else on that Wednesday morning?

A. Yes, I met Wayne Wilhoit.

Q. Do you recall what his position was?

A. No, sir, I don't really.

Q. Did you meet anybody else on that Wednesday morning visit?

A. Yes. I met—well, several of the other boys that had been up at Plant Wansley had gone to there, Larry Woods, Bob Boozer, and just a number of the people that had been at Plant Wansley before.

Q. Okay. Were these people employees working down there—

A. Yes.

Q. —or where were they working? Do you know?

A. They were working at Plant Wansley at one time, then they transferred to Plant Scherer.

Q. Where were they working at Scherer? Were they working in the office there?

A. Yes, uh-huh.

[45] Q. Were they working in the maintenance areas?

A. Well, there was some in and out and some of—Bob Boozer is personnel relations, I believe. I don't really know what Larry Woods is. I don't remember. He was some kind of wheel.

Q. When you left Plant Scherer on Wednesday morning, in your mind, did you have a deal with the people that you were talking to considering the employment?

A. Yes.

Q. What did they tell you before you left?

A. Well, they told me that—I talked with Ronnie and—Ronnie Ponseel, Olin Heath, and all of them, and they all said that everything looked good, and they were hoping how quick I could get to there, that they was going to talk to Mr. Penson and have him to—therefore to go through Mr. C. B. Head, which was project manager at Wansley.

Due to the fact that we had a 48-inch pipe cave-in out there, I had to work twelve hours a day and was digging a hole about thirty-five foot deep right straight down. Mr. Head had requested that I wouldn't leave the project until I—they finished that up, that I wouldn't leave without a week or so notice, just jump and run off and leave it.

Q. Who did Mr. Head tell that to? Did he tell [46] that to you?

A. No, sir. Ronnie Ponseel told me that he had requested that through Mr. Penson. I assume that Mr. Penson was—Ronnie Ponseel hired him.

Q. Ronnie Ponseel told you that Mr. Head wanted you to stay at yellow dirt until the trench was dug?

A. Right.

Q. Did he tell you that on that Wednesday morning visit?

A. Right.

Q. You left, and you went back to work at Wansley?

A. Right.

Q. Did you go back, and finish that trench—

A. Yes sir.

Q. —that hole that you were digging?

A. Yes, sir; stayed there five weeks.

Q. Did it take five weeks to finish that trench?

A. Well, all I was doing was waiting on Mr. Head to release me. I told him I wouldn't leave him in a tight.

Q. Mr. Head worked for Georgia Power Company?

A. Yes, sir.

Q. Did the people at Daniels know that you were leaving at at that time?

[47] A. Yes, sir. I went straight back and told my superintendent that I would be leaving, Mike Browning.

Q. Who did you talk to?

A. Mike Browning.

Q. At the end of that five weeks, what happened?

A. He came to me and told me that would be my departure date right there, June the 9th.

Q. Did you depart on June 9th?

A. That's right.

Q. Let me back you up.

The very first time that Ronnie Ponseel came to Plant Wansley, to talk to you, was there any mention at that time of your union membership or union status?

A. Not that I recall. He did mention that the position I would be in, I didn't have to be union.

Q. The second time that Ronnie Ponseel came to Plant Wansley to talk to you, was there any mention of your union status or union membership?

A. Not that I recall, no, sir.

Q. The third contact you had, was that Wednesday morning that you visited Plant Scherer, and, at that time, you discussed the job with Ronnie Ponseel?

A. Right.

Q. Was there any discussion then of your union membership or union status?

[48] A. No, sir, sure wasn't.

Q. You also discussed the job with Olin Heath?

A. Heath, right.

Q. Was there any mention of your union membership or union status with Olin Heath?

A. No.

Q. You said you also discussed the job with Wayne Wilhoit?

A. Right.

Q. Was there any discussion with Wayne Wilhoit regarding your union membership or union status?

A. No, sir.

Q. You also discussed the job that Wednesday morning that you visited Plant Scherer with Larry Woods and Bob Boozer?

A. You asked me if I seen anybody else down there. Anyway, now—

Q. Okay. Did you talk to Larry Woods or Bob Boozer at all while you were there?

A. I talked with them, just to friends on the job.

Q. Just, "Hi. How are you doing?"?

A. Yes. well, I mean, they wanted to know if I was coming to work down there, and I said, "Yes, as far as I know, I am."

[49] Q. Did they mention anything at all concerning union membership or union status to you?

A. No, sir, that wasn't none of their department whatsoever.

Q. During these first three contacts with representatives of Georgia Power Company, did you ask anybody if you had to be a member of a union in order to have that job?

A. No, I didn't, because that—Ronnie Ponseel had already pointed out that I didn't have to be a member of the union, that I would be working through a labor broker that they had which that would not attach me to the union or Georgia Power.

Q. That was on the very first meeting that you had when he came down and visited you at Plant Wansley?

A. Right.

Q. Did he tell you the name of the labor broker?

A. Superior.

Q. Did he tell you that you actually would be working for Superior?

A. Well, the labor broker—all they do—the way I understand it—is they call in the help from the—like the union hall and all—but Georgia Power has still got the right to hire their own supervision, and the check probably would have come through Superior [50] instead of being stamped out, "Georgia Power," or through the Operating Engineers or a contractor or something.

Q. Who explained that to you?

A. Ronnie Ponseel is the one that told me that I would be working for Superior, he and Olin Heath, too, I believe.

Q. So, it was your understanding then that the payroll check would actually come from Superior?

A. Right. Which they worked direct for Georgia Power; they had to.

Q. On that Wednesday visit, did you talk to anybody from Superior?

A. No, sir, I didn't.

Q. What was the status of that Daniels' job at Plant Wansley when you left on June 9th? How long was that job projected to last?

A. Well, at the time I left, it was—they was negotiating on some maintenance work around the plant and all which would run on into probably two to three years.

Q. They were negotiating that then?

A. Yes. And probably even permanent, could have been. Which they went ahead and of the—so much of it. I am not real

sure how much, but I talked with a guy down there a couple of months ago, Mike Browning, and he said they did get another year and a half work.

[51] Q. When you left on June 9th, did they have that year and a half or two years' work?

A. I don't really know.

Q. You said they were negotiating at that time?

A. Right. Well, I mean, they could have had it in the Greenville office and it might have took it that long to get there. I don't really know.

Q. As far as you knew, they didn't have that work; is that correct?

A. Well, at that time, I had though up until, I would say, along about now.

Q. So, in June of 1978, when you left, you were looking fo. ward to working approximately February of 1979?

A. Right, something like that, yes, sir.

Q. Did Daniels ever tell you what their plans were after the job ended down there in February of '79?

A. Well, no. At that point in the game, I think it was really a little too early. Of course, I had already been offered a job in Raleigh, North Carolina.

Q. By who?

A. By Daniels, if I wanted to go after this job was over.

Q. Okay. When did he make that offer? Do you recall?

[52] A. Well, it's when Mr. Ison left down there. He said if I—when this job was finished, if I wanted to come up there where he was at, I had a clear shot at it.

Q. Okay. All right. June 9th, 1978, your job ended at Plant Wansley. When did you report to Plant Scherer?

A. June 12th, on Monday morning, the following Monday morning.

Q. When you reported in at Plant Schere on June 12th, what—who did you go to first?

A. Well, I went to Ronnie Ponseel's office. And, come to find out, he was on vacation that week.

Q. Who told you to report on June 12th?

A. Well, I was hired in five weeks before that as soon as they would let me go from Plant Wansley.

Q. Did you call anybody and tell them that you were coming at Plant Scherer?

A. No. I didn't figure I had to call anybody because they was working that through the higher authorities getting me set up to leave, and they had already sent down my departure date, June 9th, and, after that, I was to report to Scherer.

Q. Who told you to report to Scherer after that?

A. The guy that hired me, Ronnie Ponseel.

[53] Q. Did he call you on the phone and tell you that your departure date was June 9th?

A. No, sir. Ronnie didn't have anything to do with it. He was at another plant.

Q. Who told you your departure date was June 9th?

A. Mike Browning—C.B. Head had told Mike Browning, and Mike Browning came and told me.

Q. When you went to Ronnie Ponseel's office and found out he was on vacation, what did you do?

A. After—I went to Olin Heath, which was right across the hall.

Q. What did he tell you?

A. He told me that he was going to be tied up in meetings all morning. He said, "Here is my radio. You take it and my

truck and just ride around over the project and see what you think," and said, "I will be with you after while. If I need you—if I need my truck or anything, I will call you."

Q. Okay.

A. Which I did until lunch time and went back in, and same thing that afternoon, he was still in meetings. So, that's the way the day went off.

Q. That's the way it went all day Monday?

A. Yes, sir.

Q. Did you ever during that day have a chance [54] to sit down and discuss your job or anything with Olin Heath?

A. Maybe three minutes or something, just briefly at lunch time, what might be going on or something, you know.

Q. What did you talk about during that three minutes? What did he tell you?

A. Mostly what—if he was going to be out there with me or any particular things that I needed to check out or look at.

Q. You mean during the day while you were driving around?

A. Right.

Q. Did you discuss at all the duties that you were going to be performing while working at Plant Scherer?

A. To him?

Q. To him, to Olin Heath, that day.

A. He knew what it was.

Q. Did you discuss them with him on that day, on that Monday?

A. No, no, not at the time, no, sir.

Q. Did you discuss your salary with him on that Monday?

A. Yes, sir.

Q. What did he tell you about your salary?

[55] A. Well, this is later on in the day.

Q. Okay. What did he tell you?

A. That's when he carried me over to Superior's trailer to actually put me on the payroll.

Q. And what did you do over there?

A. I went over and talked with—well, actually, he talked with Ronnie Lanier.

(Whereupon, a brief recess was taken.)

Q. (By Mr. Whitney) Mr. Jones, we were at the point where you said you were taken to the Superior trailer and talked to Ronnie Lanier.

When you were in that trailer, did you fill out any paper work?

A. No, sir, I didn't.

Q. Did you ever fill out an employment application?

A. No, sir, I didn't.

Q. Did you ever fill out any insurance forms?

A. No, sir.

Q. Did you ever fill out anything connected with employment at Plant Scherer?

A. No, sir, I hired individually, eye to eye.

Q. Did anybody ever tell you that you would have to complete some paper work?

A. Well, not—no, huh-uh. Which I figured I [56] after I got hired in.

Q. You said that Olin Heath took you over to the trailer?

A. Right.

Q. And he had a discussion with Lanier, correct?

A. Yes, sir.

Q. Do you recall what the discussion was about?

A. Yes, sir. He said, "I would like to put Jones on the payroll here for eleven seventeen an hour. He gets the whole works." Said, "He will be the superintendent over all the equipment." He said, "Shop and all." He said, "Everything." "He will be over the whole thing, the whole works."

So, at that time, Ronnie asked me if I had ever been—Ronnie Lanier asked me if I was a member of the Operating Engineers. I told him I had been but I wasn't then.

Q. Anything else?

A. Well, Lanier wrote it down on his pad, on his scratch pad there on the desk, and he said, "I will have to make a few phone calls"—had to call brother Archer.

Olin Heath said, "Why in the hell have you got to call Archer?"

"Well," he said, "I have got to call him."

[57] So, we walked out.

Q. That's all he said?

A. That's it.

Q. When you walked out, where did you go?

A. I came home; it was right at quitting time.

Q. Did anybody tell you to come back the next day?

A. Yes, I came right on back.

Q. Who told you that?

A. Olin Heath said, "See you in the morning."

Q. Did Olin Heath mention anything to you about Tommy Lanier, Superior Electric, or Tommy- Ronnie Lanier?

A. Ronnie Lanier.

Q. Or Ronnie Lanier's statement that he had to call Archer?

A. When we walked out, he said again, "I don't see why in the hell he had to call Archer or why that is."

Q. Okay. During that day, that Monday when you were using Olin's truck, did you discuss the job with any Georgia Power Company or contractor employees on the site—

A. No.

Q. —at Plant Scherer?

A. Sure didn't.

Q. Did you talk to anybody other than Olin and [58] Ronnie Lanier on that Monday?

A. Well, probably Bob Boozer, some of the boys there around the office, you know.

Q. Again, just passing the time of day type thing?

A. Right.

Q. Did anybody other than Ronnie Lanier mention anything to you about union membership or union status?

A. No.

Q. All right. You mentioned that you went home, you came back again the next morning.

A. Came back again on Tuesday morning.

Q. What happened then?

A. The same thing; I got in the truck and started riding again.

Q. Did Olin tell you to do that?

A. Yes, sir, he was going to be back in the meetings, and he give me the radio and everything.

Q. That would have been June 13th then?

A. Yes, sir.

Q. Tuesday?

A. Right.

Q. Did you ride around all day?

A. Yes, sir, biggest part of the day.

Q. Did you talk to anybody other than Olin on [59] Tuesday, June 13th?

A. Not—not really conversation, no more than just briefly passing by or something.

Q. Okay. Did you go back to the Superior trailer on June 13th, that Tuesday?

A. No, sir, I didn't.

Q. Did you discuss with Olin going back to Superior at all and doing the paper work?

A. No.

Q. What did Olin tell you about your job on Tuesday?

A. That afternoon, when I came in, they said that somehow or another Lanier had got a hold of Archer, Tommy Archer.

Q. Who said this?

A. Olin.

Q. Okay.

A. Olin—I believe it was Olin, Wayne, and myself, was all together at this time—Wayne Wilhoit—and they had some kind of little dispute there in their mind some way or another.

Q. Do you recall exactly what it was that he [60] told you?

A. No, I don't, not really.

Q. Did he tell you what type of dispute they were talking about?

A. Well, it was something about that Archer didn't like the idea of me being there or something, and they was having a meeting on June 20th, not particularly on this thing, but they was going to try to get it all ironed out at the same time.

Q. He said the meeting was already set up?

A. Yes. They had a meeting coming up, but they was going to put this in it, too.

Q. Did he say who that meeting was with?

A. With Archer.

Q. Did he say who was going to meet with Archer—

A. Well, no.

Q. —from Georgia Power?

A. Well, Georgia Power officials, Mr. Mitchell, and several of the high officials.

Q. Who told you that Archer didn't want you there on the job? Was that Olin or was it Wayne?

A. I think it was Olin that some way this word had got from Lanier—he had called and talked to either Archer or his assistant, and I don't know just which. Archer was supposed to have been on vacation at the same [61] time. But, anyway, they kindly got the little hint, I think, that they didn't want me—

Q. What—how did you think they got this hint?

A. Through Lanier, as far as I know.

Q. How did you know that Archer was on vacation?

A. That's what Lanier said that day when we went in Monday afternoon.

Q. Oh. But he said that on Monday?

A. Yes. Right. He said, "I have to get a hold of Archer, and he is on vacation, so I would have to talk it up with him."

Q. On Tuesday afternoon, Olin told you that Archer didn't want you on the job or Archer didn't want you there?

A. Well, they had a little dispute—Olin didn't come out and just say exactly those words, that he didn't want me on the job, so—

Q. Do you recall what Olin told you?

A. I am not real sure right to the words, but it come about that, anyway, Wayne Wilhoit and I—we was all three together; and there was some dispute some way in the matter, so Wayne suggested that—

Q. Do you remember what that dispute was about? Did he say it was about—

A. It was about me being on the job. That's what [62] it—really pointed at me.

Q. Did he say it was because of you union affiliation or union membership?

A. Well, not—not at that time, he didn't. He was unaware, just like I was, I guess.

Q. I am sorry. What was that?

A. I said he was probably unaware of what had been said of our hearing, just as well as I was.

Q. But did he tell you that Lanier got in touch with Archer?

A. Like I say, I don't know whether he got in touch with Archer or Nick Townsend, his assistant.

Q. I am talking about the best that you can recall what Olin told you that day, that Tuesday, on June 13th.

A. They had found out something from one or the other; I don't know whether it was Nick or Archer. Archer was supposed to be out on vacation, and I don't know whether they talked to Nick or Archer.

Q. Did Olin mention any names?

A. No, huh-uh.

Q. What did Olin tell you to do?

A. Well, he didn't seem to be too alarmed about it. He was just going to carry on, I reckon. And Mr. Wilhoit came up with the idea, "Well, you haven't had [63] any time off between your jobs," said, "Since they have got a meeting coming up on the 20th"—which would be next Tuesday—said, "If you would like to just take off the rest of the week and come back on the 20th"—

Q. Okay.

A. He said, "Now, you dont't have to, but if you would like to be off two or three days, well, now would be a good opportunity."

So, it really sounded pretty good to me, and—which I did. But, I told him before I left, I said, "Now, how about me just taking off until next Monday and I will be back in here working time Monday. Therefore, I will still have my payroll running just like it is now."

He said, "Okay. That will be fine."

So, for some reason, I had something I was doing around the house that I wanted to finish, and I called Wayne—I believe I called Wayne—couldn't get him, got—

Q. Okay. This was after you left on that Tuesday, on June 13th?

A. Yes.

Q. Before you left that day, did you ask them what the nature of the problem was that they were talking about?

[64] A. Well, like I told you before, they said they were having a meeting with the Operating Engineers on some other things and they would find out for sure about mine while they was in the meeting.

Q. About your situation?

A. About me being there, right, what it was all leading up to.

Q. Did you ask them what it was all about?

A. Well, I didn't have any idea what it was all about, because--

Q. Did you ask them what it was all about?

A. After—yeah, I probably did.

Q. Do you recall what they told you?

A. No, sir. I—no more than something about me being there. I just really don't recall really.

Q. Do you recall them using Tommy Archer's name and saying Tommy Archer didn't want you there?

MR. NOVY: If you do or you don't testify—

THE WITNESS: No, I don't, I don't really.

Q. (By Mr. Whitney) Do you recall them saying that your union didn't want you there?

A. Well, I was assuming that's what they was pointing at, was the union.

[65] Q. I understand what you were assuming, but do you recall them saying that the union did not want you there?

A. Yes, sir, I believe Olin said that, yes, sir.

Q. Now, as near as you can remember exactly, what is it that Olin said? What words did he use?

MR. NOVY: May I state—let's stay on the record a second. Let me instruct Mr. Jones that the question that's propounded to you is, "As best you can recall." Okay. So, you don't have to remember the conversation verbatim, word for word. He is asking you just as best you recall.

MR. WHITNEY: That's it exactly. We realize that that happened a while ago and memories fade.

THE WITNESS: Like I say, evidently, Olin Heath got his message through Lanier. And I don't know really how it come to me, but I was just saying that I thought that it was leading back to the Operating—Tommy Archer, because it came through Lanier.

Q. (By Mr. Whitney) But, do you recall Olin saying that?

A. I recall Olin talking about it, but I don't [66] recall exactly the words that was said.

Q. All right. you left on Tuesday; you went home; you stayed home a couple of days. You said you called while you were off. Who did you call?

A. I stayed off from Tuesday until Monday morning. I called back in for Wayne—for Olin to tell him that I was going to go ahead and take off Monday, too. And, I think I got Wayne Wilhoit, and I told him that I would just go ahead and take off that Monday and I would be in that following Tuesday, which would be on the 20th.

Q. Okay.

A. So, I went back into work.

Q. While you had him on the phone, was there any discussion concerning your union status?

A. No, huh-uh.

Q. Was there any discussion concerning the reason that you were off that week?

A. No. I was—the only reason I was taking off—really for my own benefit. They agreed to let me off, and I decided I would take it because I hadn't had any time off. And I wasn't actually laid off or anything; I was just given the opportunity to take it if I wanted it.

Q. Okay. Was there any discussion on that—[67] during that telephone call with Wayne Wilhoit concerning the meeting that was going to be held the next day on Tuesday?

A. No, huh-uh.

Q. All right. During that telephone conversation, you told him you would like to take Monday off, and he said, "Fine"?

A. I called him to report out from work.

Q. All right.

A. That's what I called him for. That's all I called him for, to tell him I wouldn't be in on the job until Tuesday.

Q. What was his response?

A. "Okay. That will be fine."

Q. Okay. Did you come back in on Tuesday?

A. Yes, I did.

Q. Between the time you left on Tuesday afternoon, June 13th, and the time you came back on Tuesday morning, June 20th, did you discuss your job at Plant Scherer with anybody?

A. After—yes, uh-huh.

Q. Do you recall who you discussed your job with, discussed the situation with?

A. Well, just several of my friends around home and—

[68] Q. Okay. Were any of those friends members of the Operating Engineers?

A. No, huh-uh.

Q. Any of those friends employees of Georgia Power Company.

A. No, not really.

Q. Any of those friends employees of any contractor working on any Georgia Power Company project?

A. No.

Q. Did you discuss your job or the situation at Plant Scherer with any employee of Georgia Power Company during that period of time?

A. Would you repeat that, please?

Q. Did you discuss your job or the situation at Plant Scherer with any employee of Georgia Power Company during the period of time, Tuesday, June 13th, through the time you reported back to work on Tuesday, June 20th?

MR. NOVY: I am going to object to the question in whatever you are referring to as, "the situation."

Q. (By Mr. Whitney) Did you discuss your employment with Georgia Power Company with any employee of Georgia Power Company—

A. Yes.

Q. —during that period of time?

[69] A. Yes.

Q. Who did you discuss it with?

A. Oh, I went down to Plant Wansley, and several of the boys around there, you know, asked me if I had gone to work, was I still going down there and all that. And I told them yes, I was.

Q. Why did you go down to Plant Wansley?

A. Well, just to kindly—seemed like home, you know.

Q. Okay. Anybody else?

A. No, no.

Q. Did you discuss your job at Plant Scherer with any member or officer of the union during that period of time?

A. Yes, I did.

Q. Who did you discuss it with?

A. T. D. Archer.

Q. Did you call Mr. Archer on the phone?

A. Yes, yes, I did.

Q. Do you recall when you called him?

A. I would—it was either on Friday—I was kindly surprised, getting a hold of him. I was not sure—I think it was either on Friday of that week or either on the nineteenth before the meeting.

Q. So, it would have been on Friday or Monday?

[70] A. Yes, sir.

Q. Did you call him?

A. That's right.

Q. Where did you call him?

A. I called him to ask if he was—

Q. Where did you call him?

A. Oh. I called him at the union hall.

Q. Why did you call him?

A. I called him to ask him about the job down there, that I understood he didn't like the idea of me being down there and what the deal was. And, he said, "Well," said, "you rejected our union and went to a non-union job." That's when I went to Daniels.

Q. Back in 1974?

A. Right.

Q. Okay.

A. And he said, "I really don't want you down there telling our men what to do after you rejected our union and went to a nonunion job."

So, then, I started telling him that, "Well, after five—after being out of work five months, why I had to do something. I didn't have much choice."

Q. What was his response?

A. Well, that was—that's about all it amounted to. He just told me that he didn't think I ought to be [71] on the job telling his men what to do. And that was on the day before the meeting.

Q. Anything else in that telephone conversation?

A. No, not really. I don't think so.

Q. Okay. Other than Tommy Archer, did you discuss your job with any other union member or union agent or officer?

A. No, sir.

Q. On Tuesday morning, June 20th, you reported back to work, correct?

A. That's right.

Q. Who did you report to?

A. I went to Ronnie Ponseel's office.

Q. Was he there?

A. Yes, sir.

Q. He was back from vacation?

A. Right.

Q. Did you talk to Ronnie Ponseel?

A. Yes, sir, I did.

Q. What did he tell you?

A. He said, "We are going to be tied up in a meeting." He said, "Just stick around here a while and we will be back after while."

Q. Did he tell you what the meeting was about?

A. No.

[72] Q. Did you discuss the fact that you had been off from Wednesday through Friday, or did Ponseel know that?

A. Yeah, he knew it.

Q. Did he tell you that he knew it?

A. Well, I think I made some remark about he got a full week's vacation and I just got three days, or something like that, and that's just—

Q. Was there any discussion at all with Ronnie Ponseel that morning before the meeting about your union status, union membership?

A. No, huh-uh.

Q. Was there any discussion as to what was going to be discussed in that meeting—

A. No, sir.

Q. —that was going to be held on Tuesday morning?

A. No.

Q. And he told you what, just to sit tight and he would be back with you?

A. Uh-huh.

Q. What did you do then?

A. Well, I stook around, walked up and down the hall, and went in and talked with Bob Boozer for a few minutes, and just acted like a bear out of the cage, [73] I guess.

Q. Did you talk to Bob Boozer about your job at Plant Scherer?

A. No, not really. I just walked in his office a couple three times, and the phone would ring, and I would walk out—nothing—

Q. What did you talk to Boozer about that morning? Do you recall?

A. Oh, just the old job and how things went at Plant Wansley and first one thing and another.

Q. Was there any discussion at all concerning your union status—

A. No, huh-uh.

Q. —during these discussions with Bob Boozer?

A. Huh-uh.

Q. How long did you wait around for Ronnie Ponseel?

A. Well, I seen Ronnie the first time just as soon as I went in. He came in after I got there. And, then, they went in the meeting, I think, about, I would say, around 9:30, 10:00, when they went back in the conference room.

And the next time I see Ronnie was at lunch time.

Q. Were you still waiting there?

[74] A. Yes, sir.

Bob Boozer went in the meeting and came back out, and he said, "Well, I guess they will call you in a few minutes." Which everybody thought I was going to be called up to, you know—maybe for some reason.

So, I was never called. And, last—first thing I knew, everybody was gone but just the people that worked there.

Q. Then what happened?

A. Well, I went out to lunch and got in my truck out in front of the main office there. And the big guy down at Plant Wansley was there that worked with us, Clyde O'Neal, and I talked with him and decided to go ahead and eat. And Ronnie came out and he talked with Clyde a few minutes and—

MR. NOVY: I am going to object to the form of the question at this point. I mean, you have basically put him in a narrative, and there is no direct question to him.

Q. (By Mr. Whitney) Did you have a chance to meet with Ronnie Ponseel at lunch time?

A. Yes. He told me he would like to talk with me.

Q. Where did he tell you that? Were you outside then?

[75] A. I was outside at my truck. I was sitting in the truck eating lunch.

Q. Did you talk in the truck?

A. No, huh-uh.

Q. Where did you talk?

A. He said, "I want to see you a minute."

And I said, "Now or do you want to wait until lunch is over?"

And he said, "Come on. We'll get it over with."

So, I set my plate down and went in his office.

Q. What did he tell you?

A. He said, "There has been some changes made." Said, "I am not going to be able to use you."

I said, "What the hell are you talking about? What do you mean?"

Q. And what did he say in response to that?

A. He said, "Well, we done a little switching around changing some people around, so they just decided they won't use you anymore, won't need you anymore."

Q. What did you say?

A. Well, I—there wasn't a lot I could say at something like that.

Q. You didn't say anything?

[76] A. Well, I might—I don't—I just don't remember right offhand—just something hitting you in the face like that, you know.

Q. Now, did he say anything else to you?

A. Well, he wanted my address, correct address and all, social security number and all again—which he already had that, Olin did—but he wanted it to send me my check.

He said, "I am going to go ahead and pay you from the twelfth through the twentieth for what time you have been

here. I am going to pay you for every day you was off and all," which he did.

Q. Did he say anything else to you?

A. Well, he was sorry.

Then Olin and Wayne Wilhoit walked in.

Q. Before Wayne Wilhoit walked in, was there any discussion about the reasons he wasn't going to be able to use you?

A. No. I asked him what the reason was. I said, "Just what kind of damn deal is it? You got any answers for that?"

He said, "Well, they have been—just done some switching around."

Q. Did he tell you what type of switching around they did?

[77] A. No, not really.

Q. And then Wayne Wilhoit walked in, you said?

A. The only thing he mentioned about switching was they was going to bring a Snipe—Snipes or something—in from Harley Branch, another member, union member, and do some switching around on the job.

Q. And, then, when Wayne Wilhoit came in, did he have anything to say to you?

A. Well, he was just about as surprised about it as I was—that he was real sorry and all that.

And he asked Ronnie if he didn't have something else he could use me on. And Ronnie said, "No. I sure haven't. I am just as sorry as I can be."

I said, "Well, that don't pay my bills very well, but I guess I can live with it."

Q. Anything else said?

A. That's—no. I don't think so.

Q. What did you do then?

A. I went home.

Q. Was there any discussion about Ronnie Ponseel calling over at Daniels and getting your old job back for you?

A. Discussing with who?

Q. Between yourself and Ronnie Ponseel.

A. No, huh-uh.

[78] Q. Did Ronnie Ponseel offer to do that?

A. Ronnie Ponseel didn't offer to do nothing.

Q. Did Wayne Wilhoit offer to call over at Daniels?

A. No, he didn't.

Q. At any time during that day on Tuesday, June 20th, did anybody offer to set up your old job for you?

A. No, they didn't.

Q. Did you tell Ronnie Ponseel what your plans were, what you were going to be doing?

A. No, I didn't. I didn't know what I was going to be doing.

Q. You said then, after the discussion with Wilhoit and Ponseel, you left?

A. Right.

Q. Before leaving, did you talk to anybody else.

A. Oh, maybe—maybe spoke to Bob Boozer when I went out. I don't really recall. But, more than likely, spoke to Bob or somebody when I went out.

Q. During this discussion with Ronnie Ponseel and Wayne Wilhoit, did either one mention anything about your union status?

A. No, they didn't.

MR. NOVY: Off the record.

[79] Q. (By Mr. Whitney) After you left Scherer on une 20th, did you ever contact anybody at Georgia Power Company again regarding your job there?

A. Yes.

Q. Who did you contact?

A. I called Wayne Wilhoit back.

Q. Do you recall when you called him?

A. It was probably the next day or so. I am not really sure.

Q. Do you remember why you called him?

A. Yeah. I called him to ask him what went on in that meeting that got me out of there.

Q. What did he tell you?

A. And he said they had—like I said before they had had other things that they was discussing, and Mr. Flem Mitchell mentioned the word—"Well, how about the Jones' case?" And Archer said, "Well, I didn't know whether that was going to be brought up today."

And I really didn't find out a whole lot except he—Wayne put it to me that Archer made is very plain that putting me on that job would be like waving a red flag in front of a bull.

Q. Did he tell you why? Did Wayne Wilhoit tell you why Archer had said that? Did Archer give any details in the meeting?

[80] A. No, he didn't tell me that—why.

Q. Did you ask Wilhoit?

A. No. He just told me that information, that he thought it would be like waving a red flag in front of a bull. And Archer was very careful about what he said.

Q. Did Wilhoit tell you that Archer was very careful about what he said?

A. Right, he sure did.

Q. Did Wilhoit tell you anything else during that telephone conversation?

A. No. I think he might have went back over the deal that, like I said, Ronnie had told me they was going to do some head switching around on the job some way or another.

Q. Did he give you any details on that? Did he tell you what type of switching they would be doing?

A. No more than maybe they was going to be bringing in Snipes in off from Harley Branch and do some switching that way.

Q. Was there any discussion during that telephone conversation with Wilhoit about your union status?

A. No, huh-uh.

Q. After that conversation with Wayne Wilhoit on the telephone—that would have been on Wednesday, [81] June 21st—did you have any other contact with anybody at Georgia Power Company regarding your job?

A. It was a few days after that. I called Flem Mitchell, vice president, you know, of Georgia Power construction, and asked Mr. Mitchell just what kind of deal they was trying to pull off.

Q. What did Mr. Mitchell tell you?

A. And, at that time, he told me that Mr. Archer had made it plain to him that I was in bad standing with the union because I had went to work with Daniels Construction.

Q. What else did Mr. Mitchell tell you?

A. That's about all, I think, that would be pertaining to the meeting.

Which I asked him about they had another job starting up at Rocky Mountain, and I thought I might—I had been told that Daniels was going to get it, and I asked him when it was going to start and all. And I told him I needed a job somewhere. And

he said the only thing he had at that time that he might could help me on would be Wallace Dam.

Which I went over there and they wasn't hiring anybody; and he probably knew that when he sent me.

Q. Now, referring back to that telephone [82] conversation with Flem Mitchell, to the best of your memory, exactly what did Mr. Mitchell say regarding his previous conversations with Tommy Archer?

A. Well, he left—he left the impression with me that they had to work with these organized labor.

Q. Okay. Now, did he say that?

A. Yeah. I was talking to him—and that it was either me or the rest of the men on the job go. That was the impression I got.

Q. Do you recall what he said that gave you that impression?

A. Well, just like I said, he—that they had to work so close with organized labor that—they more than likely had him in a bind there—that they had to go one way or the other.

Q. Did Flem Mitchell actually say that Tommy Archer told him that you were in bad standing with the union?

A. He said—I am not stating particularly him—he said that in the meeting, but I figure he was talking more or less to Flem Mitchell, which he was high brass in the meeting.

Q. Did Flem Mitchell say that Tommy Archer said at the meeting that you were in bad standing?

A. Yes.

[83] Q. Do you recall Flem Mitchell using those words, "bad standing"?

A. Yeah, uh-huh.

Well, at that point, I told Mitchell hisself—I said, "Well, you might call it bad standing, if you want to, but after you are out

of work for five months and they don't give you work and you have to go to work," and, "would you call that bad standing?"

He said, "That's kind of a touchy situation."

Q. Did Flem Mitchell actually tell you that Tommy Archer said in the meeting that you were in bad standing—

A. He did.

Q. —because you went to work for Daniels at yellow dirt?

A. I am not real positive on that.

Q. Did Flem Mitchell mention your going to work for Daniels at yellow dirt during that telephone conversation?

A. Well, we discussed that job, sure. I told him I had worked down there for some time.

He said I done one hell of a good job, and he was the first man to know it, that by him being all over over all the construction work that everything come to him, you know, to be handled.

[84] And I told him where I had saved him money and all this stuff.

He said, "I know that. You done one hell of a good job at Plant Wansley."

Q. Okay. Anything else during that telephone conversation?

A. I believe that's about it.

Q. Okay. After that telephone conversation with Mr. Mitchell, did you discuss your job at Plant Schere with any other employee of Georgia Power Company?

A. No.

Q. After that meeting on Tuesday, June 20th, did you discuss your job at Plant Scherer with anybody from the union, the Operating Engineers?

A. No.

Q. Did anybody from the union ever get in touch with you?

A. No.

Q. Did anybody from the Georgia Power Company ever get in touch with you?

A. Huh-uh.

Q. You said you were paid for the time that you worked for Georgia Power Company?

A. That's right.

Q. How did you get that check? Do you remember? [85] Was it mailed to you?

A. Yes, sir. I—after about five weeks.

Q. Did you have to go back to Plant Scherer after Tuesday, June 20th?

A. No, sir, I don't believe so.

I called about three or four times about my check.

Q. When you called about your check, who would you talk to?

A. Well, I talked to Ronnie a couple times, and, I believe, Olin Heath.

Q. Okay.

A. One of them might be out, and I would talk to the other one.

Then I called up here to the—where they were supposed to be running it off two or three times.

Q. Then, as I understand it, between June 20th, when they had that meeting, and June 24th, you talked to Wayne Wilhoit? You called him on the telephone on the day after, that would have been Wednesday, the twenty-first?

A. Well, I would say in a day or so there, I don't know.

Q. Within a couple of days?

A. Yes.

[86] Q. And, then, you talked to Flem Mitchell within a couple of days?

A. Yes.

Q. Those are the only two people you talked to with Georgia Power Company, and then you didn't talk to anybody from the union, correct?

A. That's right.

Q. On June 24th, did you file a charge with the National Labor Relations Board?

A. Yes, sir.

MR. WHITNEY: Let's mark it.

(Whereupon, the court reporter marked Defendants' Exhibit DGP1 for identification.)

Q. (By Mr. Whitney)Mr. Jones, would you take a look at that document?

Mr. Jones, that documents has been identified as DGP1. At the top, it says, "United States of America, Charge Against Labor Organization or Its Agents." Down at the bottom, it has a signature line for Robert C. Jones with a signature.

Is that your signature, Mr. Jones?

A. Yes, sir.

Q. And it's dated June 20th—or June 24th, rather—1978.

A. Right.

[87] Q. Is this a copy of the charge which you filed with the National Labor Relations Board?

A. Yes, sir.

Q. And did you file this charge on or about June 24th?

A. Yes, sir.

Q. Referring you up to the body of that charge itself, the typewritten material, the charge, of course, under section 1A is against the International Union of Operating Engineers, Local 926 and one T. D. Archer, as business agent.

That's the same Tommy Archer we have been discussing; is it not?

A. That's right.

Q. Now, referring you to the body of the charge itself, you said that on or about June 15th, 1978, that said union caused and procured your discharge by coercing the employer named below. And, then, you named the employer named below as Georgia Power Company.

A. Yes, sir.

Q. Now, is that the discharge that we have been discussing up to this point—

A. That's right.

Q. —that took place on June 20th?

A. (Witness nodding affirmatively.)

[88] Q. Mr. Jones, did you actually come up here to Atlanta to file this charge?

A. That's right.

Q. And did you meet with a board agent?

A. Yes, sir.

Q. Do you remember the name of the board agent?

A. No, sir. I don't right offhand. It's kind of a funny name.

Q. Do you remember her first name?

A. No, sir, I sure don't.

Q. Okay. Next, I have a copy of a letter which we are going to mark as DGP2.

(Whereupon, the court reporter marked Defendants' Exhibit DGP2 for identification.)

Q. (By Mr. Whitney) That document is a letter addressed to Robert C. Jones at Orchard Lane, signed by Curtis Mack, dated July 19th, 1978.

Mr. Jones, did you receive a copy of that letter?

A. Yes, I did.

Q. Mr. Jones, between the time—

MR. NOVY: Off the record.

Q. (By Mr. Whitney) Now, Mr. Jones, you say you did receive a copy of this letter?

A. Yes, sir.

[89] Q. Mr. Jones, between June 24th, when you filed your charge with the National Labor Relations Board and July 19th, 1978, when you received this letter, had you or did you have any contact with the National Labor Relations Board?

A. Oh, yes, I was up there a couple of times.

Q. When you went up there, did you ever give them any statements pertaining to your charge?

MR. NOVY: I will state for the record we don't have anything. He can answer the question. We don't have any copies of anything.

Q. (By Mr. Whitney) Did you give them any written statements, Mr. Jones.

A. No, huh-uh.

Q. Did you give them any documents at all pertaining to your charge?

A. Huh-uh.

Q. When you went up there, did you go up at the invitation of somebody from the National Labor Relations Board? Did they call you and ask you to come up?

A. No, sir. I called them.

Q. When you first went in and filed your charge, did you give them any written statement pertaining to your charge?

[90] A. No, I didn't.

Q. At any time between the time you filed the charge and today, did you give anybody from the National Labor Relations Board anything in writing other than this charge itself—

A. No, sir.

Q. —that's been identified as D-1?

A. Nothing.

Q. Did you ever sign any statement or anything from anybody from the National Labor Relations Board other than the charge itself?

A. That right there (indicating).

Q. That's it, the only thing you signed?

A. (Witness nodding affirmatively.)

Q. Mr. Jones, after receiving that letter that's been identified as D-2, did you ever contact the board to file an appeal?

A. No, I didn't.

MR. WHITNEY: Off the record.

Back on the record.

Q. (By Mr. Whitney) Before we do that, Mr. Jones, was there something else about that letter from the National Labor Relations Board that you wanted to ask about that's identified as DGP2?

A. No.

[91] Q. Is there something about that letter that is not correct?

A. No, huh-uh.

Q. Mr. Jones, now, I would like to refer to the complaint which you filed in the state court of Fulton County against the local, against Tommy Archer, and against Georgia Power Company.

In paragraph four of that complaint, you stated that you were a member of the local from approximately 1969 to 1974, at which time you resigned. Earlier we discussed the circumstances under which you started to work for Daniels Construction Company in or at the Plant Wansley project. Is that what you mean by, "resigned?"

A. Well, I figure after five months' time, when you are out of work and you have to go to another job, you automatically resign.

Q. Did you ever contact anybody from the local and tell them that you resigned?

A. No, sir. They hadn't done me any favors.

Q. At paragraph five, you said that you were offered a position as an equipment superintendent at Plant Scherer.

A. That's right.

Q. Is this the same job you are referring to in [92] the unfair labor practice charge that you filed?

A. That's right.

MR. NOVY: Off the record.

MR. WHITNEY: Back on the record.

Q. (By Mr. Whitney) You say in the last sentence of paragraph five that you reported to work at Plant Scherer on or about June 12. Is that what you are discussing when you said you came to Plant Scherer and Ronnie Ponseel was on vacation, so you went to see Olin Heath; is that correct?

A. That's right.

Q. In paragraph six, you say that Tommy Archer somehow caused Georgia Power Company—and I am not going to use the legal words—to discharge you.

A. Uh-huh.

Q. Did you base that allegation on the information that you were given by Wayne Wilhoit in that telephone conversation you described earlier?

A. Well, somewhat, and yes, and no.

Q. Okay. Let's take the yes part.

We already know what Mr. Wilhoit told you. "No," means what? What do you mean by, "no"?

A. Well, I am not really depending on what Mr. Wilhoit told me.

Q. What are you depending on?

[93] A. I am depending on the fact that—is that I had a job until Tommy Archer came in this meeting, and when he left, I didn't have a job.

Q. Other than what Mr. Wilhoit told you, do you know or do you have any other way of knowing what went on in that meeting?

A. No, sir.

Q. I misled you, and I didn't mean to.

There were two telephone conversations; one was Wayne Wilhoit and one with Flem Mitchell, so let me rephrase the question, if I could.

Other than those telephone conversations with Wilhoit and Mitchell, do you have any other information as to what went on in that June 20th meeting?

A. No.

Q. Now, in either of those telephone conversations, did either Wayne Wilhoit or Flem Mitchell tell you that you were not being employed because Tommy Archer did not want you on the job?

MR. NOVY: I am going to object. This is about the third—

MR. WHITNEY: This is a question regarding—

MR. NOVY: This is the third time you asked him.

[94] MR. WHITNEY: We have already established, I think, that recall isn't perfect, and every time we go through it, we seem to pick up other details, and I think it's a fair inquiry, especially given the passage of time—once again, with the caveat that I am not trying to trick him. I am just going to—

MR. NOVY: I am going to have to give you an instruction.

You are going to have to remember all your previous testimony concerning all telephone conversations that you had had, otherwise, his question is limiting them to certain telephone conversations.

Do you understand that?

THE WITNESS: Uh-huh.

MR. NOVY: Okay. Listen to his question carefully.

Q. (By Mr. Whitney) Let's do it again.

Was there anything said in the telephone conversations that you had with Wayne Wilhoit and Mr. Flem Mitchell that led you to believe that you were being denied employment because of Tommy Archer?

A. Yes.

Q. What was that specifically? Do you recall?

[95] A. Well—

MR. NOVY: Pick out a conversation, one, explain that one—

THE WITNESS: The one about—Mitchell he told me that Archer told him I was in bad standing with the union.

Q. (By Mr. Whitney) Okay. Anything else within that conversation with Mitchell? Let's stay with Mitchell.

A. No. I think that covers the whole phone call.

Q. Anything in the conversation with Wayne Wilhoit?

MR. NOVY: You can testify as to what you testified before. You can just say, "What I said before."

MR. WHITNEY: Like I say, now, we are not trying to trick you. I am just trying—sometimes you remember additional details or other things that are said.

Q. (By Mr. Whitney) Do you recall anything additional that was said in either of those telephone conversations?

A. No.

Q. Do you know who specifically made the decision to discharge you.

A. Well, I would say Flem Mitchell did since he [96] is over all the construction at Georgia Power Company, and he was, more than likely giving the orders.

Q. Do you recall specifically who made the decision to hire you?

A. No, I don't. Ronnie Ponseel—he is the one that came and hired me, but he was authorized by Mr. Penson, which was his boss.

Q. After June 20th, 1978, where did you go to work? Do you remember?

A. I didn't work any for a good little while.

Q. What do you mean by, "a good little while"? How long was it?

A. Well, up until the first of December.

Q. Between June and December, did you apply for work anywhere?

A. Oh, yes.

Q. Do you recall where you applied?

A. Well, not right offhand. I did go to Wallace Dam one time.

Q. Who did you talk to when you went to Wallace Dam? Do you remember?

A. Tex, I belive they called him.

Q. Did you fill out a written application at Wallace Dam?

A. No, I didn't. I just went in there and talked [97] to him about employment.

Q. Do you remember any other place specifically that you went to apply for employment?

A. No.

Q. Did you go to any employment agencies?

A. No.

Q. Did you check the want ads for jobs?

A. No, I didn't.

Q. Did you apply anywhere other than Wallace Dam between June and December 1st?

Q. Huh-uh.

I was talking with Daniels—I will go back—I talked with Leo Smith a time or two, and he wanted me to go way out in Kansas, and I wasn't going to move a thousand miles. So, I just—

Q. Did you ever follow up on that offer with Daniels in North Carolina?

A. No, I didn't.

Q. What happened on December or in December? Where did you go to work then?

A. Lockheed.

Q. Are you working there now?

A. That's right.

Q. What are you doing at Lockheed?

A. Welding, running an overhead crane.

[98] Q. What's your hourly rate at Lockheed now.

A. Oh, let's see—it's all mixed up—eight something an hour plus your benefits—around nine, I would say, nine twenty or nine twenty-five, something like that.

Q. Forty-hour week?

A. Yes.

Q. Any overtime at all?

A. Not up until now.

Q. Between June and December, did you work for yourself at all?

A. That's right.

Q. What did you do?

A. I pulled a few junk cars, first thing and another.

Q. Did you earn any other income between June and December 1st, other than the few junk cars?

A. Yes; my unemployment.

Q. How long did you draw unemployment?

A. Oh, I would say probably eight or nine weeks all together.

Q. Mr. Jones, do you know of any other situations in which the Operating Engineers have had somebody discharged or fired because they weren't members of the union?

[99] MR. NOVY: I am going to object to that. I don't see the relevancy of that to this litigation whatsoever.

MR. WHITNEY: I will accept that one.

Q. (By Mr. Whitney) Mr. Jones, do you know of any other situations in which the Operating Engineers has had somebody discharged because of their union or nonunion status?

A. No, not particularly.

Q. Mr. Jones, do you know of any other situations in which Georgia Power Company has discharged somebody because of their union status?

A. I don't know that much about Georgia Power.

Q. Is that no?

A. I said I don't know that much about Georgia Power operations.

Q. The question was: Do you know of any other situations—do you know of any other situations in which Georgia Power Company has discharged somebody for the—their union activiy or union status?

A. No, huh-uh.

Q. Have you ever filed any other lawsuit against the union?

A. No.

Q. Any other lawsuits against Georgia Power [100] Company?

A. No.

Q. Any other charges other than the one we have identified already with the National Labor Relations Board?

A. No, sir.

Q. Referring you back again to that charge you filed with the National Labor Relations Board, is the job referred to in that charge the identical job just referred to in the—your complaint that you filed in state court?

A. Right.

Q. Is that the identical union in the charge?

A. Right.

Q. And the complaint?

A. Right.

Q. The identical employer, Georgia Power Company, both in the charge and in the complaint?

A. Right.

Q. And the identical events leading up to that charge are the identical events that lead up to this complaint; is that correct?

A. That's right.

MR. WHITNEY: Thank you for your patience.

[101] I am going to turn it over to Mr. Jacobs.

MR. NOVY: It's been an hour and twenty minutes. Let's just take a break.

(Whereupon, a brief recess was taken.)

CROSS EXAMINATION

By MR. JACOBS:

Q. Mr. Jones, I am Harris Jacobs, and I represent the Operating Engineers Local 926 and Tommy Archer.

I am going to ask you a couple of questions, and, if you don't understand any of them or if they are not clear to you, you either stop me or tell me to ask them again or whatever, and we will see if we can move it along fairly rapidly.

A. Okay.

Q. You indictaed in your earlier testimony that you have been a member of Local 926?

A. Yes, sir.

Q. And where were you living at the time that you were a member of the local?

A. Well, I was in two or three different places. At one time, I lived on 41-19 Highway, Brentwood Apartments, south of Atlanta. One time I had a trailer over on the edge of Cobb and Paulding County.

Q. Were you married at that time?

[102] A. No, sir, I wasn't.

Q. You were not married when you were a member of the local?

A. Oh, yeah, part of the time I was, but not all the time.

Q. To your first wife or the present Mrs. Jones?

A. Present.

Q. Okay. And did you leave the local with a telephone number where they could contact you or an address where they could contact you?

A. They have always had it, plus driving there two or three times a week.

Q. Well, to get job referrals, you have to report to the union hall; is that right?

A. That's my understanding, yes, sir.

Q. Well, that's how you began being referred out, right? You would come down to the union hall?

A. Well, at that time, like I say, the work was kindly short, and they would call you if they wanted you to go out on a job. They would call you at home.

Q. Did you sign a book, referral book?

A. You could go in and put your name on the book, yes, sir, then they was supposed to work it up.

And, evidently, they pick out the right names and leave the others in there.

[103] Q. I am sorry. I didn't hear you.

A. I said you go in and sign a book, and they were supposed to work it either from the top down, the bottom up, ever which way it goes; but, evidently, they take out the ones they want and let the others go.

Q. Why do you say that?

A. Because I was out of work five months.

Q. You were the only one in the local that was out of work for five months?

A. I don't know that. I was the only one in the local that was out of work for five months and the rest of them going in and out all the time.

Q. When was this, Mr. Jones?

A. About '73, before I went to Daniels.

Q. Do you remember how much your initiation fee was to join the local, Mr. Jones?

A. I think the book that I got first was—I believe it was 75 dollars, then I had to step it up. They stepped you up to A book, and I believe it went up to 150 dollars.

Q. Did you ever pay that?

A. Yes, I did.

Q. Do you remember about when it was that you were suspended from membership for nonpayment of dues?

A. I didn't know I was.

[104] Q. You never knew you were?

A. No. The only time—like I told you gentlemen before, when I was down at Ralston Purina and I had already been out of work about four months because of my operation and out of work, too, I called T. D. Archer and told him I was going to be late on my dues, and he said, "Don't worry about it. I have got plenty of them that are going to be late."

Q. Did you ever attend the union meetngs?

A. I did.

Q. Do you remember when the last time was that you attended a union meeting?

A. It was some time during the last five months I was off I was in the union meeting.

Q. And that was in '73, do you think?

A. Seventy—well, before I went to Plant Wansley.

Q. And when did you begin at Plant Wansley?

A. I went to work down there—it seemed like it was early part of '74. I am not real positive without looking.

Q. Mr. Jones, have you ever had any difficulty with any union members on a job that you worked at?

A. No, sir.

Q. Never have been involved in a fight with any [105] union members?

A. No, sir.

Q. Have you ever owned a rifle?

A. A rifle? Yes, sir, I have owned a rifle.

Q. Do you still own one?

A. Yes, sir.

Q. Have you ever borrowed money from any members of Local 926?

A. Have I ever borrowed any?

Q. Yes, sir.

A. No, sir.

Q. You indicated in your earlier testimony that you were in the hospital for four or five—three or four months. About how long were you in?

A. No, sir; I indicated I had my gallbladder took out, and I was out of work due to my operation and out of work, too. Just as soon as I got to where I could walk and get around, I went back to the hall, but I was just another dead leaf hanging around, I reckon.

Q. How long were you out of work because of your gallbladder operation?

A. Well, I would say probably thirty days, something in that neighborhood.

Q. Did you have to stay at home after you came home from the hospital for any—

[106] A. Well, I did. I didn't have anywhere to go, and I wasn't working, so I didn't need to be going anywhere.

Q. Who was your doctor?

A. Dr. Albuquerque.

Q. Dr. Albuquerque?

A. Dr. Albuquerque.

Q. Where is he located?

A. South Fulton is all—well, he is over on Cleveland Avenue.

Q. Is he your family doctor?

A. Yes, sir.

Q. And is he the one that performed the gallbladder operation?

A. Right, right.

Q. Have you ever been hospitalized for an on-the-job injury?

A. No.

Q. Have you ever been hurt on the job—

A. Not really, I mean—

Q. —where you missed any work?

A. No, huh-uh. Maybe a little back strain or something, but that's everyday stuff.

Q. But you never have missed any work because of an on-the-job injury?

[107] A. No.

Q. Now, did you ever talk to anybody else with regard to either your unfair labor practice charge—anybody else with the union in regard to either the unfair labor practice charge or this particular lawsuit with regard to this job that you say you had at Plant Scherer other than Mr. Archer?

A. No, huh-uh. I—you mean in the union hall itself, with a union official?

Q. Yes.

A. No. He is the only one I talked to.

Q. How about Mr. Townsend? I believe you mentioned him?

A. Well, he is Archer's assistant, and he was with him down there. That's why I mentioned him, but I never talked to him about it.

Q. He was with them down there?

A. Down at Plant Scherer when they come down there for the meeting June 20th.

Q. But you never talked to anybody else, other than Mr. Archer the one time on Friday before the meeting?

A. Friday or Monday one, I don't know which.

Q. Friday or Monday before the meeting on the 20th of June?

A. Right.

[108] Q. And you say that you called Mr. Archer?

A. That's right.

Q. Do you remember about what time of day that was?

A. No, I don't. It was—I don't know., It was—I think sometime in the morning up around noon, I would say.

Q. How did that conversation start off? Do you recall?

A. Well, I just told him that I was—I wanted—I thought I would call him and ask him about the Plant Scherer job; I had a chance to go down there; and what was his feeling about that; some way or another I got it that he wasn't really approving it.

He said, "You rejected our union and went on to a nonunion job, and I don't want you down there telling our men what to do."

I said, "Yeah, but brother Archer, do you realize why I went nonunion? Because I asked you about that job at Nelson & Budd, and you said you would fill it. I told you I was going to work, and I went to work."

I didn't particularly give a damn if it was union or nonunion, but I wasn't going to lose what I had.

Well, anyway—"I don't think you ought to [109] be down there telling our men what to do," so that was about the extent of the call.

Q. When you opened the conversation, you said, "This is Mr. Jones. I have got a question"?

A. I told him, "This is Bob Jones, that"—

Q. Did he say anything to you about being on vacation?

A. I wasn't on vacation.

Q. Did Mr. Archer say anything to you about him being—

A. Not that I recall.

Q. And you say he knew that you had this job at Plant Scherer?

A. Well, I assumed he did.

Q. How?

A. I know he did, because Ronnie Lanier was going to get in touch with him. He said he was going to call him.

Q. Mr. Jones, maybe you misunderstood me.

Did Mr. Archer say to you, as best you recall, that, "I know you have got this job at Plant Scherer," or did you tell him that you had the job at Plant Scherer?

A. Well, looking through a dark pair of glasses, I would say he knew it, because he said he didn't want [110] me on the job telling his men what to do.

Q. Was this before you told him you had the job?

A. It was at the same time.

Q. Well, I am trying to get straight in my own mind,. Mr. Jones, did you tell Mr. Archer that you had this job at Plant Scherer?

A. I asked Mr. Archer what he thought about—what was the deal down at Plant Scherer about the job, about me going down there as a superintendent on the job, and he said, "I don't want you on the job because you have rejected my union and went to a nonunion job, and I don't want you telling my men what to do."

Q. And what else was said? Do you recall?

A. No, not really. Just—

MR. NOVY: Just repeat the whole conversation again for the fifth time. Just repeat the whole conversation again.

THE WITNESS: Well, that's just like I say. I called and asked the man about what the deal was down at Plant Scherer, that I was supposed to go down as superintendent, how he felt about it. He said, "I don't want you on the job. You rejected our union, went to a nonunion job; therefore, I don't want you down there telling our men what to do."

[111] Q. (By Mr. Jacobs) Did you have any further conversations with Mr. Archer after this one telephone call?

A. No, huh-uh.

In fact, he walked right by me down there and didn't speak, down at Plant Scherer. This is—now, I was sitting in Bob Boozer's office, and he walked right by and didn't say a word.

Q. Did you say anything to him?

A. No, I didn't.

Q. Did you have an attorney when you filed the unfair labor practice charge before the National Labor Relations Board last—

A. No, I didn't.

Q. —June?

It is your testimony that you did not give an affidavit to any attorney or for the National Labor Relations Board. When you filed that charge, didn't you give an affidavit or a statement?

A. Well, I had to give a statement to let him know what I was there for, didn't I?

Q. Well, that's what I am asking you about.

MR. NOVY: Are you asking about a written statement or oral statement?

MR. JACOBS: Well, did he write it [112] down—

THE WITNESS: The attorney wrote it down.

Q. (By Mr. Jacobs) After he wrote it down did you sign that statement?

A. Not to my knowledge, no sir.

Q. He didn't ask you if everything that you were telling him was true and correct?

A. He might have read it over or something and mentioned that, but as far as me signing, I believe this is the only thing I ever signed right here (indicating).

Q. The labor board attorney did not sign this statement that he was writing down, and you did not sign it, is that what you are saying?

A. Not that I remember, no, sir.

Q. You could have though?

A. Well, if I did have, I believe I would have remembered it. I am not—like I say, I am not that sure about it, because—

Q. Were you referred to Mr. Novy and Miss Rumsey—

MR. NOVY: Objection. Don't answer that question.

THE WITNESS: I don't care much about answering it.

[113] MR. NOVY: This is all personal between myself and Mr. Jones.

MR. JACOBS: On what basis, is it objectionable?

MR. NOVY: Objections are reversed, but I am going to tell you how you got to my office is our business.

MR. JACOBS: Are you instructing your witness not to answer the question, Mr. Novy?

MR. NOVY: Yes, sir, certainly am.

Q. (By Mr. Jacobs) Mr. Jones, why didn't you file an appeal when you received Defendants' Exhibit Georgia Power Exhibit #2, that letter?

A. I didn't see much point in filing one.

Q. Why not?

A. Well, they had already refused to help me.

Q. You don't recall who you talked to up there about it?

A. I don't—that guy was some kind of—some kind of funny name. I really don't know what the name was.

MR. NOVY: Would you recall the name if Mr. Jacobs knew the name?

THE WITNESS: Do you know what it is?

MRS. JONES: I don't remember.

[114] THE WITNESS: It was a funny name.

Q. (By Mr. Jacobs) Sobieski?

A. No, sir, I don't believe that was it.

Q. Did Mr. Ponseel tell you that he was hiring you for the Georgia Power Company?

A. That's right, he sure did.

Q. Why did he take you to see Mr. Lanier from Superior?

A. He didn't take me to see Lanier.

Q. Well, how did you meet Mr. Lanier?

A. Olin Heath carried me when Ronnie Ponseel was on vacation.

Q. And what was Mr. Heath's position? Do you remember?

A. I would say he probably was the area superintendent, probably working under or real close to Ronnie Ponseel.

Q. When you came in the morning of the twentieth, did you tell Mr. Ponseel about this conversation you had with Mr. Archer the day before or the Friday before?

A. No, I didn't.

Q. You told the National Labor Relations Board attorney about this conversation, didn't you?

A. I am not real sure whether I did or not. No, I don't recall whether I told that or not.

[115] Q. And what was your job to be at Plant Scherer? You were to be what, a superintendent?

A. Superintendent over all the equipment, right.

Q. And what is that? What does that mean?

A. That means you are the man over the plant, over the operators and all. In other words, I would have been the man to say yes or no to ever whatever decision might come up.

Q. Were you a master mechanic?

A. No, sir. Master mechanic—I was master mechanic when I was in the Operating Engineers, but the supervision—superintendent is usually—you have a superintendent over your master mechanic. Over your equipment foreman, you have a master mechanic or a equipment foreman and a superintendent.

Q. Over both of them?

A. Well—

Q. Both master mechanic and the foreman?

A. Right. That's absolutely right. The master mechanic tells the equipment foreman—the equipment foreman tells the master mechanic what to do; the superintendent tells the equipment foreman what to do.

Q. Did you file an income tax return for 1976?

A. I hope I did or they would have done been after me.

[116] Q. You did?

A. Yes.

Q. How about for 1977?

A. Yes.

Q. And have you filed your return for 1978 yet?

A. I have.

Q. You filed your '78 return?

A. Yes, I have.

Q. Did you keep copies of those returns?

A. I sure did.

Q. Who was this fellow Snipes you referred to in your earlier testimony? Do you know him?

A. He is one of those number one brown nosers for Tommy Archer, one of Nick Townsend's buddies down in south Geor-

gia that they put on all these good jobs. That's all I know about him.

Q. You don't know what his classification is?

A. Well, he was—I run a derrick over there at Omni a little bit, and he come over there as a master mechanic. And, like I say, he is just one of those in the few that gets all the good gravy. Yeah. He is union.

Q. Have you had a run-in with him—

A. With who?

Q. —before?

[117] Mr. Snipes.

A. No, huh-uh. No, sir, not whatsoever.

Q. Do you know him personally?

A. Well, I have worked with him and under him.

Q. You have worked under him?

A. Yes. I was—when I was running the derrick over at the Omni when they was building that addition on over there.

Q. Did you have any problem with him?

A. Not a bit.

Q. Did you ever begin work on this Plant Scherer job?

A. Yes, sir.

Q. When was that?

A. June 12th, 1978.

Q. In what capacity?

A. I went in as superintendent over the equipment.

Q. What equipment were you over?

A. Everything on the job.

Q. Did you give any instructions to anybody that—

A. No, I didn't.

Q. —day?

Did you ever give any instructions to anybody on the Plant Scherer job?

[118] A. No, sir, I didn't.

Q. You rode around in the truck, didn't you?

A. That's right. I was doing what I was told to do.

Q. Did you ever direct any equipment on the job?

A. No, sir, I didn't.

Q. Did you have any problem in drawing unemployment compensation this eight or nine weeks you drew it in '78?

A. No, sir, I didn't have any problem getting it started, just had—everybody else—like everybody else, problems getting your checks. They would lose your address one week and couldn't find it the next.

Q. Did you report like you were supposed to?

A. That's right, I sure did.

Q. Were you asked about jobs that you had applied for?

A. That's right.

Q. And what did you tell the unemployment compensation people?

A. Well, I told them just what I told this gentleman while ago, that the ones I asked for jobs, why the ones I knew I could get was plumb out of the state that I couldn't take.

[119] Half the time they didn't send my check, and you can't get out, high as gas is now. You don't get out and hunt jobs if you ain't getting a little money from somewhere. You start living off 90 dollars a week, why it don't go far.

Q. Do you know who was running—who was superintendent on the job that you were supposed to replace?

A. There wasn't supposed to be a replacement; I was supposed to be the one.

Q. There was no superintendent on the job?

A. The equipment foreman was Jiles, and the master mechanic was Stone, I think.

Q. But there was no superintendent?

A. No, sir.

MR. JACOBS: Off the record.

Q. (By Mr. Jacobs) And, as I understand your testimony, Mr. Jones, you were never advised at any time by anybody in the local that you were either going to be suspended for nonpayment of dues or had been suspended for nonpayment?

A. No. I—I've never been—I've never received a letter that I was suspended on anything on that.

Q. Are you a member of the machinists union now [120] at Lockheed?

A. Not at the present, no, sir.

Q. Have you been a member since you started work back in December of last year?

A. No, sir, you have to wait your 90 days out.

MR. JACOBS: Thank you, Mr. Jones.

RECROSS-EXAMINATION

By MR. WHITNEY:

Q. Mr. Jones, when you went down to file for unemployment compensation, did you fill out some type of form, application form?

A. Yes, I did.

Q. Do you remember a question on that form asking you who was your last employer?

A. That's right.

Q. What did you put down?

A. Georgia Power.

Q. The next question on that form is the reason for leaving.

A. I told them.

Q. What was the reason that you gave them for leaving?

A. That I was hired in one day and got fired the same day. I hired in, I thought.

Q. Did you actually put down on the form, "fired"?

[121] A. No. I didn't, but I told the guy in the—just exactly what happened.

Q. I am asking you what you put down on that form.

A. I don't remember.

Q. Did they give you a copy of that form, that application form?

A. I am not—I believe they did. I am not sure. I just have to look and see.

Q. You don't know if you still have it then or not?

A. Well, if they give me one, I have still got it. I don't hardly ever lose anything.

MR. WHITNEY: That's all.

MR. NOVY: Let me query my client for a minute.

We have nothing.

Sworn to and subscribed
before me this ____
day of _____, 1979.

_____
ROBERT C. JONES

_____
NOTARY PUBLIC
My commission expires: ____

CERTIFICATE

GEORGIA:
FULTON COUNTY:

I hereby certify that the foregoing transcript was taken down, as stated in the caption, and the questions and answers thereto were reduced to typewriting under my direction; that the foregoing pages 1 through 121 represent a true and correct transcript of the evidence given upon said hearing, and I further certify that I am not of kin or counsel to the parties in the case; am not in the regular employ of counsel for any of said parties; nor am I in anywise interested in the result of said case.

This, the 12th day of March, 1979.

VICTORIA S. WARREN, CCR-A-447.
My commission expires the 27th day of March, 1982.

IN THE STATE COURT FOR THE COUNTY OF FULTON
STATE OF GEORGIA

Civil Action
File No. 693569

ROBERT C. JONES,
Plaintiff,

LOCAL 926 OF THE INTERNATIONAL
UNION OF OPERATING ENGINEERS,
THOMAS D. ARCHER AND GEORGIA POWER COMPANY,
Defendants.

Deposition of MR. WAYNE WILHOIT, taken on behalf of the Plaintiff, pursuant to notice and agreement of counsel, all formalities waived, before Donald L. Skinner, Certified Court Reporter and Notary Public, at 1400 Candler Building, Atlanta, Georgia, commencing at approximately 9:30 A.M., Thursday, October 18, 1979.

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* * *

[3] MR. WAYNE WILHOIT. having first been duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. NOVY:

Q. State your name, please.

A. Wayne Wilhoit.

* * *

[4] Q. Where are you employed?

A. Georgia Power Company.

* * * *

Q. What is your educational background?

A. High school education, and I have a Bachelor's Degree of Civil Engineering from Georgia Tech.

* * *

[5] Q. What do you do for Georgia Power?

A. My current job is construction manager, Scherer Project.

Q. What is the responsibility of that position?

A. To see that the plant is built according to plans and specifications.

Q. That does require some of the training that you acquired as a civil engineer, is that not true?

A. That's correct.

Q. Prior to the time that you were construction manager, what was your prior position with Georgia Power?

A. Assistant Construction Manager.

* * *

[8] Q. When did you become construction manager?

A. It was in June of '78.

* * *

[13] Q. Did you have supervisory capability over the maintenance shop?

A. Not directly.

Q. Did you have it indirectly?

A. Indirectly over everything.

Q. Did you work directly with the maintenance shop, or did you have someone on your staff working with the maintenance shop?

A. I would not work directly with the maintenance shop.

Q. Who would if someone would on your staff?

A. I wouldn't say that anybody on our staff worked directly.

Q. Did anybody on your staff work indirectly?

A. Yes.

Q. Who?

A. That would be Olin Heath.

Q. Did you have supervisory capability over him?

A. Yes.

* * *

[14] Q. In June of 1978, were you, after you became the construction manager, looking at the performance of the maintenance function?

A. Not directly.

Q. Were you being informed of the performance of the maintenance function?

A. Yes.

Q. By whom?

A. By Mr. Heath.

Q. Was the maintenance function not performing to the level which you thought was acceptable?

A. From the comments made by Mr. Heath and others, there appeared to be some definite problems.

Q. Can you tell me what those problems were?

A. It appeared that the equipment was not being serviced and maintained properly and that some repair work was not done in a workman-like manner, and so forth.

* * *

[15] Q. Would that be considered part of the problems which you as the construction manager should settle—

A. Should look into.

Q. —if someone complained to you about it?

A. I mentioned Mr. Heath discussed it with me and others.

Q. Mr. Heath is basically beneath you in structure?

A. That's correct.

* * *

Q. How long before June of 1978 were you aware of the problem, month, year?

[16] A. I don't recall.

Q. Were you aware of it before June of '78?

A. I am sure that I was.

Q. Do you recall who first informed you that there was a problem?

A. Not particularly.

* * *

Q. When Mr. Heath brought the problem to you, do you recall what Mr. Heath told you?

A. Basically as I stated before that we have problems, that the equipment is not being properly maintained, et cetera, and so forth. It was creating problems because of the equipment

down time. We needed [17] to have the equipment operating that was not operating because of mechanical problems, and so forth.

Q. Did Mr. Heath bring you data to support his position?

A. I don't recall that he did.

Q. Do you normally—I'll say as supervisor, to use that term—ask for data to support opinions?

A. I could.

Q. Do you recall if you did?

A. No. I don't recall that I did.

Q. Do you know Mr. Robert Jones?

A. Yes. I know Mr. Jones.

Q. How long have you known him?

A. I believe I met Mr. Jones May of last year or June of last year.

Q. On what occasion did you have to meet him?

A. Mr. Jones was being considered, interviewed for a job at Plant Scherer.

Q. Who was considering him?

A. Georgia Power was interviewing him to see if there was interest in that job that we thought we would like to have filled.

Q. What job was that?

A. The job essentially was that of being [18] equipment coordinator and equipment superintendent.

Q. Did you have an opportunity prior to the time that you came here to read Mr. Olin Heath's deposition?

A. Yes.

Q. How about Mr. Archer's?

A. No.

Q. How about Mr. Mitchell's?

A. No.

Q. Do you know how Mr. Jones got to plant Scherer the first time?

A. I have no idea.

Q. Did you call him and invite him over?

A. No.

Q. Do you know who did?

A. I believe he had a conversation with Ronny Ponsell.

Q. Under your direction or Mr. Ponsell's individual initiation?

A. I was aware of it.

Q. How did you become aware of it?

A. In a discussion between Mr. Heath and Mr. Ponsell concerning maintenance problems and looking at people that we thought possibly might be people that we would give consideration to for the job. Mr. Jones' [19] name came up.

Q. Did you know Mr. Jones at that time?

A. No.

Q. You had never met him?

A. No.

Q. You said Mr. Heath and Mr. Ponsell discussed possible candidates? Is that correct?

A. Possible.

Q. Who was another candidate that was discussed?

A. I believe Mr. Maulden was also considered. I don't know his first name.

Q. Did, I am going to say you, Georgia Power, bring Mr. Maulden to the project to talk about the job?

A. I am not aware that we did or did not.

Q. You did not participate in that?

A. No.

Q. Do you know if Mr. Maulden was offered the job?

A. I am under the impression that he was.

Q. Do you know if Mr. Maulden turned the job down?

A. I am under the impression that he did.

Q. Is that before one of your associates asked Mr. Jones over for an interview?

[20] A. Yes.

Q. Do you recall when that was?

A. Not exactly.

Q. Do you keep a record, daily records of any kind?

A. No.

Q. When you interview employees, do you schedule them in any way?

A. Usually they have to be scheduled in some form.

Q. Do you remember if you asked Mr. Maulden to come over through a letter or personally?

A. I did not ask either way.

Q. Do you know if one of your associates asked either personally or by letter?

A. I am under the impression he was asked, and I do not know how he was asked.

Q. So a letter did not go out under your signature asking him to come up?

A. No. And I am not aware of a letter from anybody else either.

Q. How soon after Mr. Maulden turned down the job did Mr. Jones come in, in time span?

A. I don't have any idea.

Q. Would you think less than a month?

[21] A. I don't have any idea. This was in a month or two months.

Q. At that time, were you seriously looking for someone to fill this function?

A. Yes.

Q. You said, I believe, that you met Mr. Jones, as best you know, around May?

A. May or June.

Q. Whatever, the record would indicate his first visit to the job site?

A. I believe I met him the first time he came to the job site.

* * *

Q. Can you relate to me how that meeting occurred?

A. I believe Mr. Heath came into my office and told me Mr. Jones was here and would I like to talk to him, and I told him I would.

Q. And did you, in fact, talk to him?

A. Yes.

Q. Can you tell me what you told Mr. Jones [22] and Mr. Jones told you?

A. I can tell you what I told Mr. Jones. It was a relatively brief conversation. Mr. Jones came in and was introduced to me, and we chatted briefly about what I thought the requirements of the job would be and what some of our problems had been previously and what we needed and what we expected in general terms.

And Mr. Jones, as best I can recall, related to me that he thought he understood those problems and that he thought he would be able to be of some help.

Q. Did you relate specifically the problems that you were having at that time with your maintenance function?

A. I don't recall. I don't recall that. I could have. I could not have. I do not recall.

Q. Can you tell me the sum and the substance of what you told him and what you expected?

A. The sum and substance?

Q. Yes, sir. Generally, not verbatim.

A. Essentially that we had a maintenance problem and that the equipment was not being maintained properly and back through the whole thing of basically what our problems were, that some of the workmanship [23] by the mechanics was not to the degree it should have been and things that had happened that should not have happened and the equipment running out of oil filters, not being tightened down, some of the problems that had already been related to him and basically what the requirements would be to look after this.

I also mentioned to him that he would not be working directly for Georgia Power Company, that it would be the labor brokers that he was working for, the labor broker who was Superior, that part of the requirement of the job, you know. And it was also explained that we needed somebody that was experienced in this field that knew machinery and equipment and how to take care of it, what to look for, and somebody that could work the men and somebody that could plan and organize and order parts, the right quantity, that sort of stuff.

* * *

Q. At the end of the conversation, were you satisfied that Mr. Jones could do what you asked him?

A. I, from his own statement, as far as I was concerned—basically, of course, I was going on the recommendation of our people who had talked with [24] him in more depth and knew him.

Q. Who would that have been?

A. That would have been Ronnie and Olin.

Q. Is it fair to say that the fact he was presented to you meant that they were recommending him to you?

A. Not necessarily.

Q. Did they, in fact, recommend him to you?

A. Yes.

Q. Did you accept their recommendation?

A. Yes.

Q. Did you tell Mr. Jones when it would be necessary for him to start?

A. I don't recall that I did.

Q. Did you discuss possibly the starting date?

A. We possibly could have in general terms.

Q. From your recollection, when did you want Mr. Jones to start?

A. There was a general feeling among us—I am not talking necessarily about this meeting—that whoever we got we would like to go ahead and get them started as soon as possible.

Q. Did you discuss with Mr. Jones his present employment at the time he was talking with you?

[25] A. We may have mentioned it. I don't recall.

Q. Were you aware at that time that he was working on another Georgia Power project?

A. Yes.

Q. Did you learn that in the conversation, or had someone briefed you?

A. I was aware of that prior.

Q. Who briefed you on Mr. Jones, and I'm going to use that expression? Who briefed you?

A. Mr. Ponsell, Ronnie Ponsell.

* * *

Q. Who would Mr. Jones report to as far as the [26] performance of the maintenance function?

A. As far as the performance of the maintenance function, he would be reporting indirectly to Olin Heath.

Q. I assume then it was Mr. Heath's basic responsibility to get the problem straightened out?

A. I felt under his area of responsibility.

Q. Did Mr. Heath brief you on Mr. Jones?

A. We had a conversation.

Q. Discussing Mr. Jones?

A. Uh-huh.

Q. Did Mr. Heath tell you that he thought he was a good candidate?

A. Yes.

Q. Did you agree with that?

A. I didn't have any problem with it, so essentially I agreed.

Q. Was that because basically it was Mr. Heath's responsibility to get the problem straightened out or just because you generally concurred?

A. I generally concurred.

Q. Did Mr. Heath or Mr. Ponsell tell you when Mr. Jones was to come to work?

A. I'm sure that probably a date was mentioned.

Q. Do you recall that date?

[27] A. Not exactly.

Q. Did Mr. Ponsell tell you that he was not going to take Mr. Jones off the other job until some work had been finished on that job?

A. I was aware that there was a problem.

Q. Did you personally talk to Mr. Jones' supervisor—

A. No.

Q. —at Plant Wansley?

A. No.

Q. Do you think Mr. Ponsell did?

A. I think that he did.

Q. What did you learn from that conversation?

A. There was some reluctance to let Mr. Jones go from Plant Wansley.

Q. Did Mr. Ponsell tell you why there was some reluctance to let him go?

A. There was still a lot of work to be done.

Q. Did Mr. Ponsell mention to you there had been a cave-in or something? Do you recall that?

A. No. I don't know. He could have. I'm not sure.

Q. To the best of your knowledge, did Mr. Ponsell tell you that there was some date fixed for Mr. Jones to come to work?

[28] A. Yes. They had arranged on a release date from his work at Plant Wansley that the people at Wansley had agreed upon. And--

Q. That would be—I'm sorry, go ahead and finish.

A. That's all.

Q. It would have been a date agreeable to them to let him go and a date agreeable to the personnel at Plant Scherer for him to begin?

A. Right.

* * *

Q. After the first meeting with Mr. Jones, when was the next time that you saw Mr. Jones?

A. I would assume or as best I can recall that, I believe, the first meeting, the next meeting probably would be the date that he came over in preparation to work.

Q. And the date that you referred to as his preparation to go to work, that would have been June 12th?

[29] A. I believe it would be.

* * *

[32] Q. Do you know Tommy Archer?

A. I've met Mr. Archer.

Q. Did you know Mr. Archer prior to June 12th, 1978?

A. No.

* * *

Q. When was the first time you met Mr. Archer and Mr. Townsend, if you recall?

A. I met Mr. Archer a week or something after that.

* * *

Q. Was that the first time you met him?

A. Right. Mr. Townsend, although I had not met him, I had seen him on the job site, so I probably [33] knew him.

Q. Visually, not his name?

A. By recognition, right.

Q. What type of pay was Mr. Jones to have received?

A. It was in the range of $11 to $12 an hour.

Q. Any other fringe benefits?

A. Yes.

Q. Could you tell me what they were?

A. Basically there was some subsistance pay, some living expenses involved. There would have been sick pay, some other things possibly. It's a matter of record that we normally sort of include in our payments to superintendents that were working for labor brokers.

Q. You say it is a matter of record. Is there a book that says this is what we paid these people?

A. I think the contract change orders on the contract spell that out.

Q. How about the use of a truck?

A. Yes. That would be provided.

Q. On the 12th of June, did you make any arrangements to get a truck for Mr. Jones?

[34] A. Not that I recall, I did not.

Q. That was not your responsibility?

A. No.

Q. How many superintendents do you have that work in the functions that you control?

A. Indirectly or directly?

Q. Let's try indirectly?

A. It would be hard to say.

Q. More than two dozen?

A. Probably.

Q. How many of those had you taken to the labor broker?

A. None.

Q. None. Would Mr. Jones have been one of those two dozen if he had been on the job?

A. We are talking about all superintendents directly.

Q. Do you have control over all superintendents?

A. Indirectly.

Q. Just distinguish for me what the difference is between indirectly and directly as you use it?

A. Directly, I only have control over employees of Georgia Power Company. Indirectly, I should have control to some degree over all contractors [35] and all craft superintendents.

Q. So if Mr. Jones worked for the labor broker, I assume the labor broker worked for Georgia Power?

A. That's right.

Q. So the indirect control you had was your company could tell the labor broker who could tell Mr. Jones?

(A discussion was held off the record.)

* * *

Q. My question I propounded to you was that if you were dissatisfied with a superintendent, you would report it to the labor broker for the purpose of taking care of it? Is that correct?

A. If, in fact, the superintendent worked for the labor broker.

Q. You had superintendents on the site that did not?

A. Yes.

Q. How may did you have?

A. That was counting the two dozen.

Q. Can you break out of the two dozen how many did not?

A. I would say—did not?

[36] Q. Break it out either way, so many worked for the labor broker and so many did not.

A. I would say that the labor broker probably has eight, somewhere in that range.

Q. That would leave 16 not employed by the labor broker?

A. Right.

Q. Hired and employed by Georgia Power?

A. No.

Q. Who?

A. Other contractors.

Q. Who were they employed by?

A. May I mention also that the number of people and the number of contractors and the number of superintendents fluctuated as the work fluctuated?

Q. I assume you are aware that Mr. Heath was going to take Mr. Jones over to the labor brokers when he got to the site?

A. Yes.

Q. Was that at your direction or was that general procedure?

A. General procedure.

Q. Did you go to the labor broker?

A. No.

Q. Who took Mr. Jones to the labor broker?

[37] A. I'm not sure. I believe Mr. Heath.

Q. Is the labor broker Georgia Power Company's employee?

A. They are the contractors that work for us.

Q. And I may have asked you this, but who was your site contact with the labor broker at your site?

A. The contact could have been a number of people.

Q. Do you know who Mr. Heath went to?

A. Mr. Heath went to Mr. Lanier, I believe.

Q. Were you aware of what occurred at that meeting?

A. Generally.

Q. Would you tell me generally what you were aware of?

A. That Mr. Lanier did not want to place Mr. Jones on his payroll.

Q. Why?

A. That was a little indefinite. At least nobody could say exactly why. Nobody really understood exactly why. I am not sure that anybody knew or that it was stated why.

Q. Well, when Mr. Heath came back you had a [38] conversation with him? Is that correct?

A. That's correct.

Q. And Mr. Heath was a little heated, was he not?

A. Absolutely.

Q. Would you say he was damned mad?

A. What do you mean by damned mad? There are certainly different degrees of mad.

Q. Was he angry?

A. A little heated.

Q. What did he say.

A. He was disturbed.

Q. What did he say?

A. He stated that he had taken Mr. Jones, Bob Jones, over to Ronnie Lanier to see about getting him on the payroll and that Ronnie Lanier did not want to place him on the payroll and could not understand why and didn't understand if there was any problem. And anyway he was mad because Mr. Lanier wouldn't place Bob on the payroll or didn't want to place him on the payroll.

Q. Mr. Heath told you what Mr. Lanier had said, did he not?

A. He may have.

Q. Did he tell you Mr. Lanier said he had a [39] call from Mr. Archer?

A. He could have.

Q. What did you respond to that?

A. I don't recall necessarily.

Q. Did you tell Mr. Heath that you would look into the matter?

A. I told him that we would have to look into it and see what we could work out, see what the problem was.

Q. But you don't recall Mr. Heath saying that Mr. Lanier said that they would have to call Tommy Lanier?

A. I could have or I could not. I don't recall.

Q. Did you know who Mr. Archer was at this time?

A. Yes.

Q. Were you aware that he was the business manager of the operating engineers?

A. Yes.

Q. And I assume you are aware that the man who would fill this job for which Mr. Jones was being considered would be supervising other operating engineers? Is that correct?

A. Yes.

[40] Q. And that was, in fact, the function, that he had to supervise members of the union?

A. Yes.

Q. How many union members were working in the maintenance shop?

A. I would say probably eight, somewhere in that neighborhood, around eight or ten. I don't know exactly.

Q. And he would have direct supervisory responsibility over them?

A. Direct or indirect, depending.

Q. Depending on what?

A. Depending on what your definition of direct and indirect happens to be.

Q. With regard to the level of management between where Mr. Jones was and where the mechanics were?

A. I would say yes.

Q. What was the title in between those?

A. You have master mechanic.

Q. He would have been above the master mechanic?

A. Correct.

Q. His job would be to tell the master mechanic who would then tell the mechanics?

A. Yes.

[41] Q. Who was the master mechanic at that time?

A. At that time a fellow by the name of Stone was master mechanic.

Q. Did you know Mr. Stone to see him?

A. Oh, yes.

Q. Did you know him to talk to him?

A. I chatted once or twice with him.

Q. Had you chatted with him about the maintenance function?

A. I would say yes.

Q. Did you indicate your displeasure to Mr. Stone with the performance of the maintenance function?

A. Yes.

Q. How many meetings did you have with Mr. Stone of that type conversation, let's say?

A. Probably no more than one or two.

Q. And I assume in those meetings or conversations that Mr. Stone assured you he would get the problem straightened out?

A. If you say so.

Q. No. I don't want to say so.

A. I don't recall what Mr. Stone's reply was.

Q. You were not interested in what he replied?

[42] A. Well, I would not say that. I would say I was interested in his reply.

Q. When you told Mr. Heath that you would look into it, what did you mean by that?

A. That I would pursue it with different people and see what the problem was and see if, in fact, we could work something out. As I said before, we didn't really know what the problem was or why there was a problem.

* * *

[43] Q. After you talked with Mr. Heath, were you in any way perturbed about what had occurred?

A. Slightly.

Q. Did you go back and talk to Mr. Lanier?

A. I don't recall whether I did or not.

Q. Who did you talk to concerning the problems?

A. I am sure that I—once again, I do not recall any particular incident. I am sure I talked with Mr. Pinson about it.

Q. Anyone else?

A. None that I recall.

Q. When did you talk to Mr. Pinson, if you recall?

[44] A. I don't recall. But I am sure it was within the next day or so.

Q. Do you recall what the sum and substance of that conversation was?

A. No.

Q. You said that you learned or something that Mr. Jones was going to have a problem working with the operating engineers? Is that correct?

A. Right.

Q. Are the operating engineers members of the Local 926 that—

A. Yes.

Q. When do you use the term operating engineers, I assume you mean the Union of Operating Engineers?

A. Operators, yes.

Q. What problem was he going to have that you learned of?

A. It would appear that there existed some hard feelings between himself, Mr. Jones, and some members of this local and that they, in fact, would not want to work for him or with him, that sort of thing.

Q. Who was working in the maintenance shop at that time, if you recall, by name?

[45] A. Who?

Q. Yes, sir.

A. We mentioned Mr. Stone.

Q. Yes.

A. I did not know any of the mechanics.

Q. So you don't know any of their names?

A. No.

Q. Well, was he going to have problems with these people that you don't know their names?

A. I don't know.

* * *

[46] Q. And now you said that he was going to have a problem with the operating engineers. Was that just a general problem, or was it a specific problem?

A. I thought in terms of general.

Q. I am just trying to understand what you assumed from that statement. What did you assume? What kind of problem did you assume?

[47] A. That the workmen would not want to cooperate with him, that there would be some friction between the workmen.

Q. Is that because he was an ex-union member? Is that your assumption?

A. Not necessarily.

Q. What was your assumption why they wouldn't want to work for him?

A. I just had that general feeling.

Q. Who told you that?

A. We are going back to a time frame—I am not sure when the concept and idea came about. I am not sure Ronnie Lanier mentioned it or it came from other people.

Q. That it was generally that the operating engineers did not want to work for Mr. Jones, right?

A. (The witness nods his head.)

Q. Yes?

A. Right.

Q. After you got that concept, did you talk to Mr. Pinson about that concept?

A. I don't recall if I did or not, but most likely I did.

* * *

[48] Q. Who suggested that there be a meeting held?

A. I don't know. I don't recall. But most likely—it was obvious we would have a meeting of some kind, and most likely the suggestion of the meeting came from Mr. Pinson.

Q. Do you recall when the meeting was scheduled for?

A. There was a meeting scheduled, I believe, on the Tuesday after that.

Q. Did Mr. Pinson tell you that the meeting [49] was scheduled, or did someone tell you, or did you tell someone?

A. I don't recall who told who.

Q. Well, prior to the meeting, did you know who was going to be at the meeting?

A. Yes. I knew some of the people that would be there.

Q. Who did you think would be at the meeting?

A. I assumed Mr. Pinson would be at the meeting. Mr. Archer, I believe, was informed. I was informed that Mr. Archer would be at the meeting, and Mr. Lanier was to have some people there, and we were to have some people.

Q. But you don't recall whether it was Mr. Lanier or someone else who told you the operating engineers would not work for Mr. Jones?

A. I don't recall.

Q. You just learned that sometime in that week?

A. Right. I do recall that it was mentioned in the meeting that we had.

* * *

[50] Q. You knew what the subject of the meeting was going to be? Is that correct?

A. I was sure it had to do with our maintenance problem because of the people that would be there, or at least I thought it would be.

* * *

[51] Q. Who came to the meeting?

A. As best I can recall, I think that Ronnie Ponsell was there, Olin Heath, Ronnie Pinson, Ronnie Lanier, and Mr. Mitchell, Mr. Archer, Mr. Townsend, and I believe Mr. Hall

was there. It seems to me like three people from the operating engineers were there.

Q. Mr. Hall, the gentlemen across the table?

A. Yes. I believe he was there. I don't recall exactly.

Q. I believe you and Mr. Heath made some decision about Mr. Jones in the interim between June 12th [52] and the time of the meeting? Is that correct?

A. Right. We decided to let him remain on site, I believe, a couple of days the first week to more or less go around the site to become familiar with it. He had been around it some with Mr. Heath.

* * *

Q. How did the meeting begin, as best you can recall?

A. I'm not sure who opened the meeting, but it led right into Mr. Heath telling about the maintenance [53] problem we had.

Q. Was Mr. Heath basically the center of the program and his presentation?

A. In the beginning.

Q. Tell me just basically, after Mr. Heath made his presentation, what occurred then?

A. Basically, as far as I can recall he talked about equipment problems. And then we went from there and discussed the situation with the master mechanic, what we felt was lack of cooperation, this sort of stuff. This involved sort of an open discussion with Mr. Mitchell and Mr. Archer and ourselves.

* * *

[54] Q. But in your discussion, you assumed that Mr. Archer would be there?

A. Yes. I am sure someone informed me Mr. Archer would be there, or I may say someone from the operating engineers may have mentioned Mr. Archer by name or may not have. I don't recall.

Q. After you had discussions with Mr. Stone, et cetera, what occurred then?

A. Mr. Archer, I believe, stated that he realized there had been some problems and that he thought he had the solution to this problem with the master mechanic. And he wanted to propose it, that we would change out the master mechanic, they would bring another master mechanic in to take his place.

Q. That would be from the operating engineers?

A. Right.

Q. Did you mention that Mr. Jones was a candidate for this job?

A. No. Mr. Jones was not a candidate for the job.

Q. I'm sorry. It was—

A. It was not mentioned at the time.

Q. Did anyone mention that he had been?

A. Not at that time.

Q. And what happened on the discussion about [55] Mr. Snipes?

A. There was a general open discussion about Mr. Snipes. It seems as though some people knew Mr. Snipes and worked with him before and felt like he was easier to get along with than Mr. Stone.

Q. Did Mr. Ponsell mention that Mr. Jones had been brought there on June 12th for whatever purpose?

A. Not at that point.

Q. At what point did he mention that?

A. After the discussion. And there was a good bit of discussion concerning the master mechanic, Mr. Stone. And there was some discussion about Mr. Snipes. This person did this or that, and he had quoted 20 years experience, this sort of stuff.

At the end, we all agreed that it would appear to be a reasonable step to take that Mr. Snipes would replace Mr. Stone. That time, someone brought up the question of Mr. Jones' job.

Q. This is interesting. Do you know who it might have been that asked the question about Mr. Jones?

A. I do not recall. But it could have been one of several people.

Q. Just name me one of several people.

[56] A. One of several?

Q. Yes.

A. It could have been Mr. Ponsell.

Q. How about some more? Anybody else that it might have been?

A. I said one of several.

Q. How about anyone else?

A. Mr. Heath could have mentioned it. Most likely, I would think probably one of those two, but I don't recall.

Q. Who responded to that?

A. As best I can recall there may have been some other comments, but eventually Mr. Archer made a comment.

Q. What did Mr. Archer say?

A. Essentially, I think his first comment was he wasn't aware there was anything here to discuss or something to that fact, you know, I am not aware that we were discussing anything about that or seemingly that was something he was a little surprised at, whatever.

Q. Do you recall if he said, I wasn't aware we were going to discuss the Jones case?

A. He may have said that. He said something to the effect well, I wasn't aware the meeting was [57] about this or this was one of the things we wanted to discuss, something to that effect.

Q. By this, you are referring to Bob Jones?

A. Yes.

Q. After he became aware that you were going to discuss Jones, what did he say?

A. He made a statement that—he may have made several other statements. But one of his statements he made was something to the effect of having Mr. Jones there would be like waving the red flag in front of the bull, and he went on to elaborate to say, as best I can recall, there had been some ill feelings between the operating engineers and Mr. Jones and that there were some problems and that he felt like his men would not, in fact, work and cooperate with Mr. Jones to the degree that was necessary to get the job done.

* * *

[59] Q. And when Mr. Archer made his statement concerning Mr. Jones, do you remember your position as to whether or not you would have Mr. Jones on the job?

A. It appeared that we should.

Q. What?

A. It appeared that we should.

Q. Should not?

A. That we should consider the question.

Q. Do you remember considering the question at that time?

A. Yes.

Q. What did you decide?

A. Our decision was, taking all things into consideration, that it probably would not be to everybody's advantage to have Mr. Jones on the job.

Q. One of the things that you were concerned about was the fact that the maintenance function had run into trouble in the first place? Is that correct?

A. Correct.

Q. I assume that you were concerned if the men, the operating engineers, would not work with Mr. Jones in the maintenance function, it would not be [60] right again?

A. (The witness nods his head.)

Q. Is that correct?

A. Correct.

Q. That would really be through no fault of Mr. Jones, would it?

A. That is correct, possibly.

Q. It would just be that the men refused to work for him?

A. Possibly.

Q. Did Mr. Archer mention any of the mechanics that were presently working other than Mr. Stone for Plant Scherer?

A. Not that I recall.

Q. Did he mention specifically that any man who did not like Mr. Jones?

A. Not that I recall.

Q. Just a general statement?

A. (The witness nods his head.)

Q. What was your interpretation of what that statement meant?

A. Which statement?

Q. The fact that the operating engineers would not work for Mr. Jones.

A. That, in fact, they would not work with [61] him as they should, that there would be a lack of cooperation and they probably just simply wouldn't be a harmonious, workmanlike relationship between the two groups.

Q. And from your experience, then you concluded that you would be back in the same position you were prior?

A. Possibly or that it would not be, quote, a good situation.

Q. Mr. Jones did not have to be a member of the union to be a superintendent for you, did he?

A. He did not.

Q. Did anyone offer in the meeting the fact that Mr. Jones had left a job to come to this job?

A. I don't recall.

Q. Did you yourself?

A. I don't recall.

Q. Did anyone from Georgia Power speak in Mr. Jones' behalf?

A. I don't recall.

Q. You were content with the situation?

MR. WHITNEY: I object to that question. Go ahead and answer it if you can, but it's argumentative.

THE WITNESS: Was I content with the [62] situation?

Q. (By Mr. Novy) As a result of the meeting?

A. I would not necessarily say so.

Q. Why were you not content?

A. Things had not worked out as we had hoped. There were some displeasant things about the situation.

Q. The fact that Mr. Jones was not going to be employed, is that one of the things?

A. The fact of the overall situation.

Q. Could you explain it for me?

A. It had been a little bit of a trying time because of the fact that we were in the process of offering Mr. Jones a job, and we had not been able to get the details worked out to that degree.

Q. Is it true the fact that he was not now going to be employed was what caused your discontent?

A. To a degree, I suppose.

Q. That was somewhat contrary to your own personal wishes? Is that correct?

A. It's hard to say. Just it was—if I could go back to the question that you asked, you want to know if I was content means what in your mind?

Q. Satisfied.

A. Satisfied?

Q. Yes, sir.

[63] A. Not exactly.

Q. It was your assumption that Mr. Jones would be the superintendent prior to that meeting? Is that correct?

A. No. I would not say so.

Q. What would you say?

A. It would appear that Mr. Jones' status of being superintendent was somewhat indefinite.

Q. And after the meeting, it was final? is that correct?

A. It appeared to me that it was.

Q. And it was clear that he would not?

A. Right.

Q. And did that leave you dissatisfied, that result, personally?

A. As I said, there was some. I would say I was content—

Q. To use my word.

A. —or to say that I was dissatisfied, slightly dissatisfied.

Q. Did you ever have any discussion after that time concerning Mr. Jones?

A. At the end of the meeting or perhaps right after the end of the meeting, there was a very brief meeting to discuss what we would do with Mr. [64] Jones.

Q. Who was in that meeting?

A. As best I can recall, we would be talking about the people that were at the other meeting, the Georgia Power Company people and perhaps Mr. Lanier. I don't recall whether he was there or not.

Q. I apologize. I didn't listen to the remainder of the answer.

A. I said at the end part that Mr. Lanier may have been there, but that I didn't recall whether he was there or not.

Q. Mr. Lanier, yourself—

A. Mr. Mitchell, Mr. Pinson, Mr. Ponsell, Mr. Heath.

Q. What did Mr. Lanier suggest that you do with Mr. Jones?

A. I just stated I was not sure he was there.

Q. Okay. What did you suggest you do with Mr. Jones?

A. I don't know that I suggested anything. There was a general discussion that we had some problem. That was

generally the gist of the conversation that it ended up we felt we should not have offered Mr. Jones the job.

Q. Can you get more specific about who talked [65] and what they said?

A. No. I don't recall who, but generally the fact being it would appear that there was a possibility that we were fixing, if in fact, hiring Mr. Jones, it would be hiring a superintendent who could not in effect be able to work the men to the degree that we thought was necessary and there would be some problems there. As I stated before, that was one of the requirements that we said, that it was a necessity in working with the craft people to be able to work with the craft people.

Q. There was no question as to Mr. Jones' ability to do the job given that he had cooperative workmen, was there?

A. From my point of view, no.

Q. And there was no question that Mr. Jones had performed work of the type that you were interested in and performed it effectively?

A. So I was told.

Q. And you learned that from your subordinate, Mr. Heath, who reviewed Mr. Jones' work record at Plant Wansley and Mr. Ponsell, and the only question was whether or not the men would cooperate with him in order to make a harmonious working arrangement?

A. Whether or not they would be harmonious and [66] have a good workmanlike relationship.

Q. And you had been informed that the men would not cooperate with him?

A. As so stated by Mr. Archer.

* * *

[68] Q. Did you call or assess your position as to [69] whether or not Mr. Lanier could do what he said, that is, not

hire your superintendent? Did you call anyone and ask their opinion?

A. I don't recall that I did. I may have discussed it with Mr. Pinson, but I don't recall.

Q. Prior to the meeting, did you assess whether or not Mr. Lanier could do that?

A. I was under the impression that he, in fact, could.

* * *

[75] BY MR. WHITNEY:

Q. Mr. Wilhoit, did anybody at Georgia Power Company ever personally promise you personal contentment in business decisions?

A. No.

Q. Has anyone ever discussed the elements of contentment to you in the making of business decisions?

A. No.

Q. Have you ever been promised by the Georgia Power Company that you would have contentment with all of the decisions that you were to make on the job?

MR. NOVY: I object to leading the witness.

* * *

Motion to Dismiss or Affirm

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No. 81-1574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and TOMMIE D. ARCHER,
Appellants

v.

ROBERT C. JONES, *Appellee*

ON APPEAL FROM THE COURT OF APPEALS OF GEORGIA

MOTION TO DISMISS OR AFFIRM

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QUESTION PRESENTED

Whether the Court of Appeals of Georgia was correct in holding that federal labor law did not preempt a State court action for tortious interference with a contract of employment where: the injured party was not protected by that federal law, the State of Georgia had a deep rooted interest in protecting the rights of its citizens, and there was little risk of interference with federal labor policy.

PARTIES TO THE PROCEEDINGS

Robert C. Jones	*Plaintiff-Appellee*
Local 926, International Union of Operating Engineers	*Defendant-Appellant*
T. D. Archer	*Defendant-Appellant*
Georgia Power Company	*Defendant below*

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No. 81-1574

IN THE

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OCTOBER TERM, 1981

LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and TOMMIE D. ARCHER, *Appellants*

v.

ROBERT C. JONES, *Appellee*

ON APPEAL FROM THE COURT OF APPEALS OF GEORGIA

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16.1(a) and (d), the plaintiff-appellee (hereinafter "plaintiff") respectfully moves to dismiss or affirm the decision of the Georgia Court of Appeals in this Case.

STATUTORY PROVISIONS INVOLVED

The federal statute involved is the National Labor Relations Act (hereinafter the "NLRA").[1] The rele-

[1] 49 Stat. 449 (1935), as amended. (Codified as 29 U.S.C. §§ 151-169 (1976), Subchapter II of the Labor Management Relations Act of 1947.)

vant sections are 2(3), 2(11), 7, 8(b)(1) and 14(a),[2] which provide in pertinent part:

§ 2 *Definitions*

(3) The term *"employee"* . . . shall not include any individual employed as a supervisor . . ..

(11) The term *"supervisor"* means any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

§ 7 *Rights of Employees*

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities . . ..

§ 8 *Unfair Labor Practices*

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce

(A) *employees* in the exercise of their rights guaranteed in section 7 . . .; or

---

[2] 29 U.S.C. §§ 152(3) and (11), 157, 158(b)(1) and 164(a) (1976).

(B) an *employer* in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

§ 14 *Construction of Provisions*

(a) . . . [N]o employer subject to this [Act] shall be compelled to deem individuals defined herein as *supervisors* as *employees* for the purpose of any law, either national or local, relating to collective bargaining.

(Emphasis supplied.)

STATEMENT OF THE CASE

The plaintiff has no major dispute with the Statement of the Case in the defendants' Jurisdictional Statement. However, the following additional facts will put the case in its proper perspective.

The State of Georgia has enacted right-to-work laws providing that membership or non-membership in a labor union cannot be made a condition of employment.[2]

The defendant labor union (hereinafter "Local 926") represents its members throughout the State of Georgia. The defendant Archer is the Secretary-Treasurer of Local 926 and has effectively controlled Local 926 for the past thirty-three years.

This case is a tort action under the common law of Georgia in which the plaintiff, a supervisor as defined by the NLRA, alleges that the defendants tortiously interfered with his contract of employment because he was not a member in good standing of Local 926. The defendants maintain that this state cause of action is

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[2] Ga. Code Ann. §§ 54-901 and 54-905 (1981).

preempted by the unfair labor practice provisions of the NLRA and plaintiff's attempts to obtain relief pursuant to those provisions.

The plaintiff is normally employed in the construction industry and is a former member of the defendant Local 926. During the 1974 recession in the construction industry, the plaintiff and many other members of Local 926 were out of work for many months. After approximately five months of unemployment the plaintiff, *through his own efforts,* found employment with a construction firm in Chamblee, Georgia. He contacted Local 926 through the defendant Archer, and notified them that he had found a job and should be taken off the "out-of-work" list.

Archer told the plaintiff that he could *not* have the job because there were other members of Local 926 with a higher priority. The plaintiff was very upset and had "words" with Archer. The plaintiff quit paying union dues and went to work for one of the largest non-union contractors in the South, Daniels Construction Company (hereinafter "Daniels").

During his employment with Daniels, the plaintiff received many promotions and by 1978 was serving as Daniels' Superintendent of Equipment Maintenance at the construction of a power plant being built for Georgia Power Company (hereinafter "Georgia Power"). The high quality of plaintiff's work was noted by Georgia Power officials.

In 1977, Georgia Power resumed construction work on another power plant, Plant Scherer, using union labor rather than Daniels Construction Company. The collective bargaining agreement between Georgia Power and the construction unions provided that Georgia

Power, and its subcontractors, were free to select their "supervisors" without the approval of the union.

During late 1977 and early 1978, Georgia Power began experiencing equipment maintenance problems at Plant Scherer. These problems were traced to the lack of proper supervision in the equipment maintenance facility. After a series of meetings with Local 926 failed to improve the situation, Georgia Power contacted the plaintiff to see if he would leave his job with Daniels and come to Plant Scherer as Superintendent of Equipment Maintenance, *a supervisory position*. The plaintiff was told that construction on Plant Scherer would last for 8 to 10 years and that he would be carried on the payroll of Georgia Power's labor broker. The plaintiff was also told that he would *not* have to be a member of Local 926.

The plaintiff was invited to Plant Scherer to meet with key management personnel. During this visit the final terms of his employment were worked out and he returned to his job and gave notice to Daniels. On Friday, June 9, 1978, the plaintiff terminated his employment with Daniels and proceeded to Plant Scherer, reporting for work the next Monday—June 12, 1978.

The plaintiff's immediate supervisor took him to the labor broker to have him put on the payroll. The labor broker informed them that he would have to check with the defendant Archer at Local 926. The supervisor stated that "Archer's permission was not required since Local 926 did not have any say in who Georgia Power hired as supervisors." The labor broker just reiterated that he would have to check with Archer. The Georgia Power supervisor notified the Project Manager who said that he would look into the matter.

The next day, the plaintiff learned that defendant Local 926 had objected to his employment. It was agreed that the plaintiff would take the rest of the week off while Georgia Power checked out the problem with Local 926. During his week off, the plaintiff contacted the defendant Archer and asked why the Union objected to his employment. Archer told him that "he didn't want the plaintiff down there telling his men what to do after he had left the Union and gone to a non-union job."

On June 20, 1978, Georgia Power held a meeting with the labor broker, Local 926, and Archer over the problem. The plaintiff was informed that the meeting would take place, and waited outside the conference room waiting to be called into the meeting. He was never called and did not participate in the meeting. He was later notified that Georgia Power was sorry, but his services would no longer be required.

On June 29, 1978, the plaintiff filed unfair labor practice charges against the defendants, alleging that Local 926: (1) caused or procured his discharge because he was not a member in good standing, and (2) coerced Georgia Power in the selection of its supervisor and bargaining representative, in violation of sections 8(b)(1)(A) and (B) of the NLRA. These charges were filed with Region 10 of the National Labor Relations Board (hereinafter "Board").

On July 19, 1978, after an investigation by Board agents, the Board's Regional Director notified the plaintiff that he was *not* going to issue a Complaint because of insufficient evidence and informed him of his right to appeal to the Board's General Counsel. The plaintiff did not file an appeal.

In December of 1978, the plaintiff filed the present lawsuit alleging: (1) that defendants Local 926 and Archer tortiously interfered with his contract of employment, and (2) that Georgia Power violated the Georgia right-to-work statute by discharging him because he was not a member in good standing of Local 926.[4]

The defendants filed a Joint Motion To Dismiss on the grounds that plaintiff's causes of action were preempted by the NLRA. The trial court granted their motion and plaintiff appealed to the Georgia Court of Appeals. The Court of Appeals sustained the dismissal of the employer on the grounds of federal preemption *and* Georgia's employment-at-will doctrine.

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[4] Although plaintiff's counsel was aware of this Court's holding in *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974) (NLRA § 14(a) preempts state right-to-work claims of supervisors who were discharged because they were members of the union), it was believed distinguishable because the plaintiff in this case was a "non-union" supervisor. The rationale being that if a labor union could force an employer not to use "non-union" supervisors it could effectively defeat Congress' intent in passing § 14(a), i.e. employers to have the right to ensure the loyalty of its supervisors by not requiring it to employ union supervisors who may have divided loyalties.

Although this rationale is at odds with the literal wording of § 14(a), this Court has held "that a thing may be within the letter of the statute and yet not governed by the statute, because not within the intent of its makers." *Holy Trinity Church* v. *United States*, 143 U.S. 457 (1892); *National Woodwork Mfgrs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 619 (1967); *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616, 618 (1975); *Muniz* v. *Hoffman*, 422 U.S. 454, 469 (1975).

This issue is not before the Court because the Georgia Court of Appeals sustained the dismissal of the right-to-work claim against the employer on a non-federal ground (employment-at-will).

The Court of Appeals did, however, reverse the trial court's dismissal of the defendant Local 926 and its Secretary-Treasurer.

Following an unsuccessful petition for writ of certiorari to the Georgia Supreme Court, the defendants perfected a timely appeal to this Court.

MOTION TO DISMISS

The defendants assert jurisdiction in this Court pursuant to 28 U.S.C. § 1257(1) which provides in pertinent part that this Court may review, *by appeal,* a final decision of a state court declaring a federal statute invalid. In this case, the Georgia Court of Appeals held that the federal statute did not preempt the state court of jurisdiction over a supervisor's claim of tortious interference with his contract of employment. The Georgia Court of Appeals did *not,* however, declare the federal statute invalid; rather it held that it was inapplicable to the particular facts of this case.

To be appealable under § 1257(1), the state court decision must explicitly hold the federal statute invalid in whole or in part as applied to the particular circumstances of the case. *Flournoy* v. *Wiener,* 321 U.S. 253, 263 (1944). It is not enough that the state court merely construes the statute so as to deny a claim thereunder, or that it views the facts so as to place the litigant outside the scope of the federal law. *Ivanhoe Irrigation District* v. *McCracken,* 357 U.S. 275, 289-290 (1958).

Accordingly, defendants' claim of jurisdiction under 28 U.S.C. § 1257(1) must fail. Review, by way of *appeal,* is not available. Review by this Court is avail-

able only by writ of certiorari, pursuant to 28 U.S.C. §§ 1257(3) and 2103. Plaintiff will now demonstrate that certiorari is not appropriate.

Rule 17.1 of this Court provides that "a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." The rule goes on to provide that one of the key factors considered is whether a state court has decided an important question of federal law in a way in conflict with applicable decisions of this Court. Rule 17.1(a).

The defendants allege that the Georgia Court of Appeals refused to follow this Court's prior preemption decisions involving federal labor laws. The plaintiff disagrees. As discussed in greater detail in plaintiff's alternative Motion to Affirm, *infra*, the Georgia Court of Appeals carefully considered this Court's decisions involving preemption and correctly applied them to the facts of this case.

Defendants would have this Court adopt a *per se* preemption theory whereby any potential conflict between state law and federal labor policy automatically deprives the state court of jurisdiction. This Court has declined to adopt such a *mechanical* approach to the inherent tensions of our federalist form of government. *Farmer* v. *Carpenters*, 430 U.S. 290, 302 (1977). Instead, this Court's preemption decisions have weighed the competing interests of the state and federal governments in regulating the challenged conduct.

When the State has a substantial interest in regulating the conduct and there is little likelihood that the state regulations would unduly interfere with the

federal regulatory scheme, this Court has declined to find preemption. *Id.* This is just such a case.

It is respectfully submitted that there is no conflict between the decision of the Georgia Court of Appeals and the prior decisions of this Court. Accordingly, the defendants' alternative petition for writ of certiorari should be denied.

MOTION TO AFFIRM

Alternatively, the plaintiff moves to affirm the judgment of the Georgia Court of Appeals.

A. The Holding of the Georgia Court of Appeals.

The decision of the Georgia Court of Appeals is based upon the following rationale:

(1) Georgia has a strong interest in protecting the rights of its citizens "to earn a livelihood, and to seek redress against anyone who wrongfully causes him to be discharged from employment." *Wiley* v. *Georgia Power Co.*, 134 Ga. App. 187, 190, 213 S.E.2d 550 (1975); *Georgia Power Co.* v. *Busbin*, 242 Ga. App. 612, 615, 250 S.E.2d 442 (1978), overruled on other grounds. (Appendix to Jurisdictional Statement, hereinafter "App.," p. 2a).

(2) Even though a person's employment contract is at will, he has a valuable contract right which may not be unlawfully interfered with by a *third person. Ott* v. *Gandy*, 66 Ga. App. 684, 19 S.E.2d 180 (1942); *Georgia Power Co.* v. *Busbin, supra*, 242 Ga. App. at 613. (emphasis added) (App. p. 2a).

(3) The activity complained of is neither protected activity within the meaning of § 7 of the NLRA nor an unfair labor practice within the scope of § 8 of the NLRA. (App. p. 4a).

(4) The federal authorities determined that there was insufficient evidence to indicate a violation of the NLRA. (App. p. 5a).

(5) The issues before the federal authorities and the State court were dissimilar enough to present separate and distinct issues for adjudication, especially regarding punitive damages and attorneys fees. (App. pp. 5a, 7a).

(6) A state action based on tortious interference with an employment contract, in the context of this case, would create no realistic risk to the effective administration of national labor policy. (App. p. 6a).

B. The Preemption Analysis of the Georgia Court of Appeals.

Under our federalist form of government, the regulatory power is shared between the national and state governments. Since both governments may have concurrent jurisdiction, there have been many problems of conflicts and accommodation, especially in the area of labor law. Pursuant to the Supremacy Clause [5] of the federal constitution, the states may lose their power to act in a given area when Congress enacts legislation dealing with that area. Whether Congress has preempted the field is a matter of legislative intent and

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[5] U.S. Const. Art. VI, § 2.

often involves difficult problems of statutory construction.

In the field of labor law, there has been more than forty years of litigation over the boundary lines defining the area of exclusive federal control.[6] The case law interpreting the statutes indicates that the federal law generally preempts state laws and state court jurisdiction when *either:*

(1) The conduct which the State seeks to regulate is an area subject to the jurisdiction of the Board, *and* is also either

(a) prohibited or arguably prohibited by the unfair labor practice provisions [§ 8] of the NLRA, *or*

(b) protected or arguably protected by the employee rights provision [§ 7] of the NLRA; *or*

(2) the state action, although neither plainly prohibited nor protected by the NLRA, would upset the balance of power between labor and management established by the federal law.

The Georgia Court of Appeals closely scrutinized the potential conflict between the state and federal causes of action and determined that the federal law did *not* preempt the state's jurisdiction. This ruling was made *only* after carefully examining this Court's ruling in *Iron Workers* v. *Perko,* 373 U.S. 701 (1963); *Linn* v.

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[6] For excellent discussion of preemption in labor law, see Cox, *Labor Law Preemption Revisited,* 85 Harv. L. Rev. 1337 (1972) and Cox, *Recent Developments in Federal Labor Law Preemption,* 41 Ohio St. L. J. 273 (1980).

United Plant Guard Workers, 383 U.S. 53 (1966); *Sears, Roebuck & Co.* v. *San Diego Council of Carpenters,* 436 U.S. 180 (1978); and *San Diego Bldg. Trades Council* v. *Garmon,* 359 U.S. 236 (1959). In doing so, the Georgia Court of Appeals followed this Court's guiding light in the preemption analysis of state tort claims. In *Farmer* v. *Carpenters,* 430 U.S. 290 (1977), this Court stated:

> Our cases indicate . . . that inflexible application of the [preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.

430 U.S. at 302.

The Georgia Court of Appeals properly applied these holdings to the facts set forth in plaintiff's complaint which alleged, *inter alia:* that Georgia Power officials offered the plaintiff employment as the Superintendent of Equipment Maintenance, a supervisory position; that in reliance on this offer, the plaintiff terminated his prior employment and reported to work at Georgia Power; that the defendants maliciously and intentionally intimidated and coerced Georgia Power into breaching its contract of employment with the plaintiff; and that Georgia Power discharged the plaintiff because he was not in good standing with the defendant Local 926.

The key fact is the plaintiff's *employment status.* It is undisputed that he was being hired as a "supervisor," as that term is defined by the NLRA. It is also clear that "supervisors" are not protected by the provisions of the NLRA. The unfair labor practice pro-

visions protect *only* employees or employers from coercion by labor unions. See NLRA §8(b)(1)(A) and (B).

Had the plaintiff been hired as an "employee," within the meaning of the NLRA, the National Labor Relations Board would have had exclusive jurisdiction and any state cause of action would probably have been preempted. *San Diego Building Trades Council* v. *Garmon, supra; Sears Roebuck & Co.* v. *San Diego Council of Carpenters, supra. But see, Farmer* v. *Carpenters,* 430 U.S. 290 (1977); *United Auto Workers* v. *Russell,* 356 U.S. 364 (1958); *Linn* v. *United Plant Guard Workers, supra.*

Although supervisors have no protected rights under the NLRA, an employer's right to discharge its supervisors is not absolute. If a supervisor's discharge interferes with the protected rights of rank-and-file employees, it will be found unlawful and remediable by an order of reinstatement and a backpay award. A supervisor's discharge has been found unlawful when the supervisor:

- refused to commit an unfair labor practice;
- attempted to prevent the employer's commission of an unfair labor practice;
- refused to spy on organizing activities of employees; and
- refused to lie to the Board.

Additionally, a supervisor may obtain some protection by way of section 8(b)(1)(B) which protects his *employer* from union coercion in the selection of its representation for the purpose of collective bargaining or grievance adjustment.

Thus, although not directly protected by the NLRA, a discharged supervisor may have some derivative protection because his discharge also impacts on "persons" protected by the NLRA. In *Iron Workers* v. *Perko*, 373 U.S. 701 (1963), this Court had to decide whether a supervisor's state court tort action was preempted by the NLRA. The court held that since the plaintiff was employed sometimes as an "employee" and sometimes as a "supervisor" he was at least *arguably* an "employee" and thus directly protected by the NLRA. The Court also found that the Board *might* find the actions alleged in the state court complaint were also unfair labor practices, and hence there was *sufficient probability* of cognizability by the Board to require the relinquishment of the state's jurisdiction. Accordingly, the state cause of action was preempted by the federal labor law.

In recognition of such *potential* federal jurisdiction, the plaintiff filed unfair labor practice charges against defendant Local 926 alleging that it had violated section 8(b)(1)(A) and (B) by coercing *employees* in the exercise of their §7 rights and his *employer* in the selection of its bargaining representative.

In response to this charge, the Regional Director of the Board specifically found that "the evidence was insufficient to establish that the union caused your discharge or that it restrained or coerced the employer in the selection of its representative for the purposes of collective bargaining." The Regional Director went on to conclude that there was no evidence that the union engaged in any unlawful conduct regarding plaintiff's status as a supervisor. (App. p. 26a). Accordingly, the Board refused to exercise its formal jurisdiction by issuing a Complaint. The unfair labor practice charges

never went past the investigation stage and the plaintiff was unable to obtain relief under the federal statute.

He was not, however, without a state remedy. Under the common law of Georgia, a worker has a cause of action against a third party who interferes with his contract of employment. *Ott* v. *Gandy,* 66 Ga. App. 684, 19 S.E.2d 180 (1942); *Georgia Power Co.* v. *Busbin,* 242 Ga. App. 612, 250 S.E.2d 442 (1978). Although there was insufficient evidence to authorize the exercise of federal jurisdiction, the defendants argued that the federal law preempts this State tort claim.

This Court, in *Farmer* v. *Carpenters, supra,* established a three-prong test to determine whether an individual's state tort claim was preempted by federal law. First, the court looks to see if the underlying conduct is protected by the Act. 430 U.S. at 298. In the present case, Local 926's tortious interference with plaintiff's employment contract is clearly not protected by the NLRA.

Second, the court determines whether there is a significant state interest in protecting its residents from the tortious activity and whether this interest is "deeply rooted in local feeling and responsibility." *Id.* The Georgia Court of Appeals specifically reaffirmed that Georgia considers protecting its citizens against this type of tortious activity to be "deeply rooted in local feeling and responsibility." (App. pp. 3a-4a). *See, e.g., Sheet Metal Workers* v. *Carter,* 133 Ga. App. 872, 212 S.E.2d 645 (1975), *cert. denied,* 423 U.S. 1078 (1976); *Electrical Workers* v. *Briscoe,* 143 Ga. App. 417, 239 S.E.2d 38 (1977), *cert. denied,* Ga. Supreme Court (1978).

Third, the court is to determine whether the state cause of action would interfere with the effective administration of national labor policy. 430 U.S. at 298. As previously pointed out, the Regional Director of the Board found there was insufficient evidence to justify federal jurisdiction. Thus there was no possibility of interference with the federal regulatory scheme.

Even if the Board had decided to exercise its jurisdiction, this case should not have been preempted. In *United Construction Workers* v. *Laburnum Const. Corp.*, 437 U.S. 656 (1954), this Court assumed that the union's conduct interfered with employee rights under § 7, but nonetheless upheld a state court damage award for injuries due to a work stoppage. This court commented on the inadequacy of the Board remedies and noted that if it held the state court action preempted, it "will in effect, grant [the union] immunity from liability for its tortious conduct" and found "no substantial reason for such result." *Id.* at 664. *Accord, United Auto Workers* v. *Russell*, 356 U.S. 634 (1958).

In *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), this Court held that state action for trespatory picketing, although both arguably prohibited and arguably protected by the NLRA, was not preempted because the issues before the Board and the state court were not identical. In this case, the issues before the Regional Director and the state trial court would not be identical. The Regional Director would be proving that the discharge of the plaintiff violated the statutory rights of *some other person* protected by the NLRA, i.e. either rank-and-file employees or the employer. In the state court, the plaintiff would only have to prove that the

union unlawfully interfered with *his* contract of employment. Additionally, the damages and remedies available would be significantly different.

Additionally, as Justice Blackmun pointed out in his concurring opinion in *Sears,* the state court jurisdiction was preempted *only* until such time as the General Counsel declined to issue a Complaint. *Id.* at 209 (J. Blackmun, concurring). The General Counsel (through the Regional Director) has declined to issue a Complaint in this case.

In summary, the Georgia Court of Appeals correctly applied the doctrine of federal preemption to the facts of this case and determined that:

(1) Georgia has a deeply rooted interest in protecting its citizens from the complained of activity;

(2) the alleged activity is not protected by the federal labor laws; and

(3) this state court action does not interfere with the administration of national labor policy.

Accordingly, the Georgia Court of Appeals correctly held that this cause of action was *not* preempted by the Federal labor laws.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or the decision of the Georgia Court of Appeals affirmed.

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Appellant's Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO AND TOMMY D. ARCHER,
Appellants,

v.

ROBERT C. JONES,
Appellee.

On Appeal From The Court of Appeals State of Georgia

BRIEF FOR LOCAL 926, IUOE, ET AL.

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QUESTIONS PRESENTED

1. Have the Georgia appellate courts invalidated that portion of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A), *et seq.*, which categorizes alleged Union and Union officer interference with employment as an unfair labor practice?

2. Have the Georgia appellate courts denied and abridged the rights of the Union and Union officer T. D. Archer, who was sued personally, to protection under the Supremacy Clause and Interstate Commerce Clause of the Constitution of the United States?

3. Have the Georgia appellate courts denied the Union and Union officer Archer their rights under the Privileges and Immunities Clause, the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment of the Constitution by the Georgia courts' refusal to apply decisions of this Court concerning pre-emption in labor law? *

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* The parties to this proceeding are: Robert C. Jones, Plaintiff; Local 926, International Union of Operating Engineers, Defendant; T. D. Archer, Business Agent, Local 926, IUOE, sued individually as a Defendant; Georgia Power Company, Defendant.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1574

LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO AND TOMMY D. ARCHER,
Appellants,

v.

ROBERT C. JONES,
Appellee.

On Appeal From The Court of Appeals
State of Georgia

BRIEF FOR LOCAL 926, IUOE, ET AL.

OPINIONS BELOW

The slip opinion of the trial court dismissing the complaint for lack of jurisdiction is not reported. It appears at J.S. 9a-11a.[1] The opinion of the Georgia Court of Appeals reversing the trial court is reported at 159 Ga. App. 693, 285 S.E. 2d 30. It appears at J.S. 1a-8a. The decisions of the Georgia Supreme Court denying the writ of certiorari and denying the motion to reconsider the denial of the writ of certiorari are not reported. They appear at J.S. 12.

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[1] J.S. refers to the Jurisdictional Statement in this case.

JURISDICTION

The Court of Appeals of Georgia rendered its decision on September 9, 1981 and denied rehearing on September 25, 1981. The Supreme Court of Georgia denied appellants' petition for a writ of certiorari on November 9, 1981 and denied rehearing on November 25, 1981. On February 22, 1982, appellants filed a jurisdictional statement invoking the appellate jurisdiction of this Court and urging in the alternative that the appeal be treated as a petition for writ of certiorari. On May 28, 1982, this Court entered an order postponing the question of jurisdiction until the hearing on the merits. (50 L.W. 3934). Accordingly, this subject is discussed at pp. 8 to 10, *infra*.

STATUTORY PROVISIONS INVOLVED

The jurisdiction of this Court depends on 28 U.S.C. §§ 1257 and 2103. The merits of the case involve §§ 7, 8(b)(1), 10(a), (b) and (c) of the National Labor Relations Act as amended, 49 Stat. 449, 61 Stat. 136, 29 U.S.C. §§ 141 *et seq.* (sometimes hereafter referred to as "NLRA" and "the Act"). These provisions are set forth in pertinent part in the statutory appendix at pp. 1a-3a, *infra*.

STATEMENT OF THE CASE

On June 20, 1978, appellee Robert C. Jones filed a charge with the National Labor Relations Board ("NLRB") against appellant International Union of Operating Engineers Local 926 ("Union"). He alleged therein that the Union had violated §§ 8(b)(1)(A) and (B) of the NLRA by the following conduct:

> On or about June 15, 1978, and thereafter, the above-named labor organization caused and procured the discharge of Robert C. Jones, and thereby coerced the employer named below in the selection of its supervisors and bargaining representative, because

> said individual had not been a member in good standing of said labor organization. [J.S. 25a]

The employer thus named was the Georgia Power Company, located in Atlanta, Georgia. (*Id.*)

On July 19, 1978, Regional Director Curtis L. Mack notified Mr. Jones that he would not issue a complaint on Mr. Jones' charge. The text of Mr. Mack's letter-decision is as follows:

> The above-captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.
>
> As a result of the investigation, it does not appear that further proceedings on the charge are warranted. The Region concluded that the evidence was insufficient to establish that the Union caused your discharge or that it restrained or coerced the Employer in the selection of its representative for the purposes of collective bargaining. Rather, it appears that the Employer implemented certain changes in its supervisory structure which included your removal from the project. While the Union did participate in discussions regarding the changes, there was no evidence that it engaged in any unlawful conduct regarding your status as a supervisor. I am, therefore, refusing to issue complaint in this matter.
>
> Form NLRB-4938, Procedure for Filing an Appeal, is attached. The appeal period expires at the close of business on August 1, 1978. [J.S. 26a]

Mr. Jones did not exercise his right to appeal the Regional Director's decision to the General Counsel.[2]

---

[2] The procedure followed by the General Counsel in exercising his statutory authority (NLRA §§ 3(d) and 10(b)) to issue or not issue an unfair labor practice complaint after a charge has been filed, including appeals from Regional Director decisions is described in *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 139-140.

In December, 1978 Jones filed an action in the State Court of Fulton County, Georgia, naming as the defendants the Union, Tommie D. Archer, its business agent (the appellants herein) and the Georgia Power Company. Count I of his complaint, after describing the defendants, contained the following allegations:

4.

Plaintiff herein was a member of Local 926 from approximately 1969 to 1974, at which time he resigned.

5.

During the month of April 1978, Plaintiff was offered a position as Equipment Superintendent at Plant Scherer through Ronald Ponsell, a representative of Georgia Power Company, which offer of employment was accepted and all terms thereof agreed to by the representatives of Georgia Power Company and the Plaintiff. Plaintiff reported to work at Plant Scherer on or about June 12, 1978.

6.

On or about June 20, 1978, Thomas D. Archer, acting on behalf of and as an agent of Local 926, maliciously and with full intent, intimidated and coerced Georgia Power Company, or caused Georgia Power Company to be intimidated and coerced, into breaching its employment contract with the Plaintiff.

7.

In reliance upon the agreement for employment between Georgia Power Company and the Plaintiff, Plaintiff had terminated his prior employment.

8.

As a result of the malicious and willful acts enumerated above, Plaintiff lost his employment with Georgia Power Company or with any assignee of Plaintiff's employment contract with Georgia Power Company and has suffered damages in the amount

> of $25,000.00 in lost wages and privileges which had been granted in conjunction with this job. [J.S. 15a]

On the basis of these allegations, Jones prayed for a judgment against the union defendants "of $25,000.00 for lost wages and privileges, plus $50,000.00 in punitive damages, plus $5,000.00 in attorneys fees, interest, and the costs of this action;" (J.S. 16a).

In Count II he incorporated the allegations of Count I and also alleged that the Georgia Power Company "did maliciously and with full intent discharge the Plaintiff from his employment with Georgia Power Company because Plaintiff was not a member of Local 926 of the International Union of Operating Engineers, a labor organization." (J.S. 16a). He prayed for the same relief against Georgia Power Company (*id.*).[3]

The defendants moved to dismiss plaintiff's complaint on the ground that the Georgia court lacked jurisdiction over the subject matter because the complaint set forth a cause of action preempted by the federal labor laws. On November 10, 1980, the state court (Etheridge, J.) granted the motion. The court followed the "test" for preemption set out in *San Diego Unions v. Garmon*, 359 U.S. 236, as "explained and expanded" in *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180. (See J.S. 9a-10a). On the basis of *Sears* the trial court identified the principal inquiry as being whether "the controversy presented to the State Court is identical to or different from that which could have been, but was not, presented to the Labor Board" (J.S. 10a, quoting 436 U.S. at 197; see pp. 20-21, *infra*). Applying that test the court said:

> In *Jones* it is clear that the controversy before the State Court is identical to the controversy presented

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[3] Thereafter plaintiff twice amended his complaint in respects which do not appear to be presently material (see J.S. 18a-23a). He also added Superior Contractors & Associates, Inc. as a party defendant (J.S. 24a).

> to the NLRB. The adjudication of the issue presented to this court would necessarily involve the merits of the underlying labor controversy. Since the focus of the Board and State procedures would be identical there is a real danger of two different resolutions to the same problem. As there is such a great risk of State interference with the National Labor policy in the adjudication of this claim, the State must yield jurisdiction. [J.S. 10a]

As an additional ground for decision the court said:

> In addition to the above-stated reasons, the State Court should not assume jurisdiction over the plaintiff's allegations since the Labor Board has already exercised jurisdiction over this matter. The Board apparently dismissed plaintiff's claim after it had considered the merits of the case and found the plaintiff's evidence to be insufficient. It is important to note that the claim was not dismissed upon the jurisdictional ground of noncoverage of supervisory employees. As such, the plaintiff's assertion that he is not covered by the Labor Act has no merit. Since the NLRB has already scrutinized the alleged conduct complained of, it is not within this court's jurisdiction to take a second look at the same actions. [Id. 11a]

On the basis of the NLRB's "prior adjudication" the court distinguished this case from two earlier cases in which the Georgia Court of Appeals had ruled that the state courts have jurisdiction over a claim that a union has tortiously interfered with the employment of the plaintiff, *Sheet Metal Workers International v. Carter, et al.*, 133 Ga. App. 872, 212 S.E. 2d 645 and *International Brotherhood of Electrical Workers v. Briscoe*, 143 Ga. App. 417, 239 S.E. 2d 38 (J.S. 11a).

On plaintiffs' appeal the Georgia Court of Appeals affirmed the dismissal of the complaint against the Georgia Power Company on the ground that the "employer could terminate Jones at will and cannot be held liable

for a conspiracy to do that which they legally were entitled to do." (J.S. 2a-3a) However, the Court of Appeals reinstated the complaint against the union defendants on the ground that it was not preempted by the National Labor Relations Act. The court followed its *Carter* and *Briscoe* decisions. It ruled also that Jones' filing of an unfair labor practice charge with the NLRB, the Regional Director's decision, and his failure to appeal, did not affect its jurisdiction. (J.S. 4a-8a).[4]

The Court of Appeals' opinion is discussed in detail at pp. 18 to 32, *infra*. The Supreme Court of Georgia, with one judge dissenting, denied the union defendants' petition for writ of certiorari. (J.S. 12a).

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[4] The Court rejected the plaintiff's reliance on the Georgia "right-to-work" laws on the authority of *Beasley v. Food Fair of North Carolina*, 416 U.S. 653 (J.S. 8a).

STATEMENT ON THE JURISDICTIONAL ISSUES

In seeking review of the judgment below the union defendants invoked both the appellate jurisdiction of this Court and the certiorari jurisdiction pursuant to 28 U.S.C. §§ 1257 and § 2103. (J.S. 2-3.) In setting the case for plenary consideration the Court postponed the issue of jurisdiction to the hearing on the merits.

In light of the Court's order, in preparing this brief on the merits counsel have examined afresh the question whether this case is properly here on appeal. We are constrained to advise the Court that the answer to that question is "no." The plaintiff's complaint did clearly invoke the Georgia "right-to-work" statute. (J.S. 18a-19a.) The defendants therefore urged in the state courts that the "right-to-work" statute is for purposes of this case preempted by the National Labor Relations Act, as amended, and that under the Supremacy Clause the state law cannot be constitutionally applied herein. If, in reinstating the complaint, the Court of Appeals of Georgia had rested its decision on that Georgia statute, an appeal to this Court would clearly be proper. But from our rereading of that court's opinion, it is plain that the court below rested its decision exclusively on Georgia's common-law tort of interference with contractual relationships. Thus, we acknowledge that this case does not "draw in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity." (28 U.S.C. § 1257(2).)

We do urge, however, as we did in the jurisdictional papers, that pursuant to 28 U.S.C. § 2103 the appeal be treated as a petition for a writ of certiorari and that certiorari be granted. The Union clearly asserted a defense in the court below based on the National Labor Relations Act and the Supremacy Clause and the court below squarely rejected that defense. (J.S. 2a-8a.) Moreover, the federal defense was expressly raised in the

union defendants' request for hearing before the Supreme Court of Georgia, which request was denied. (J.S. 12a). We submit also that this case merits review under the standards of this Court's Rule 17. The court below squarely decided that the state courts may, in a tort action, entertain a plaintiff's claim that a union coerced his employer to discharge him, although the same claim could be, and indeed has been, presented to the National Labor Relations Board in the form of an unfair labor practice charge. That decision is, as we develop in the body of our argument, squarely inconsistent with the decisions of this Court. Moreover, the question of whether tortious interference with contractual relations qualifies, as decided below, for the exception from the preemption doctrine for activity which "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction we could not infer that Congress had deprived the States of the power to act" (*San Diego Unions v. Garmon*, 359 U.S. 236, 243-244), is one of general importance because of the prevalence of that tort in some form in most if not all states, and because of its historic use (and abuse) to regulate labor relations. (See pp. 25 to 26, *infra.*)

One more word needs to be said as to jurisdiction. Appellee did not, in his motion to affirm, deny that the judgment of the Court of Appeals of Georgia is "final" within the meaning of that term as used in 28 U.S.C. § 1257. That court did decide that the complaint herein raises a state law cause of action whose adjudication is not barred by the Supremacy Clause. That being so, the judgment is final because

> the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where

reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. [*Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-483.][5]

SUMMARY OF ARGUMENT

I. The decision below is squarely inconsistent with *Iron Workers v. Perko*, 373 U.S. 701. There this Court held that the Ohio state courts could not entertain an action which alleged that the defendants had "committed a common-law tort against [Perko] by conspiring to deprive him of his right to earn a living and interfering with his contract of employment . . . ." (373 U.S. at 703). Accepting *arguendo* Perko's contention that he was a "supervisor" for purposes of the National Labor Relations Act, the Court determined that his state court allegation that the union had demanded that the company discharge him was "arguably" a violation of both §§ 8(b)(1)(A) and 8(b)(1)(B) of the Act (*Id.* at 707-708). Thus, under the leading case of *San Diego Unions v. Garmon*, 359 U.S. 236, regulation of this conduct was within the exclusive primary jurisdiction of the National Labor Relations Board, and the state court judgment was reversed (373 U.S. at 708). See also the companion case of *Plumbers' Union v. Borden*, 373 U.S. 690, reversing a state court judgment under the same common-law tort theory where the plaintiff was an NLRA "employee" rather than a "supervisor".

Appellee Jones' claim of employment discrimination, like Perko's, arguably states a violation of §§ 8(b)(1)(A) and 8(b)(1)(B) of the NLRA—as indeed Jones recog-

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[5] See also *NAACP v. Claiborne Hardware Co.*, —— U.S. ——, 50 L.W. 5122, 5127, n. 42 (July 2, 1982).

nized in the unfair labor practice charge he filed. (J.S. 25a). The court below should therefore have affirmed the trial court's dismissal for want of jurisdiction.

II. The grounds given by the Georgia Court of Appeals for reinstating the complaint lack merit. In seeking to differentiate this case from *Perko's* holding that the claim was an arguable violation of § 8(b)(1)(B) the court below apparently misconceived the basis of the Regional Director's dismissal of Jones' charge. That official did not rule, as the court below suggested, that Jones was not a § 8(b)(1)(B) employer representative, but rather that the employer discharged him without union compulsion. If Jones disagreed with that conclusion, the recourse prescribed by Congress was an appeal to the General Counsel rather than a state court action. If, on the other hand, the Georgia court was saying that the Regional Director's determination was a conclusive determination that no violation of § 8(b)(1)(B) had been committed, the statement is a legally insufficient basis for distinguishing *Perko* and asserting jurisdiction over Jones' claim. For the "exclusive competence of the National Labor Relations Board" (*Garmon*, 359 U.S. at 245) does not give way to state court jurisdiction once the agency has concluded that an unfair labor practice has or has not been committed. See *Sears, Roebuck & Company v. Carpenters*, 436 U.S. 180, 197; *Farmer* v. *Carpenters*, 430 U.S. 290, 306-307. Moreover, the Georgia court's basis for saying that the conduct alleged is not arguably a violation of § 8(b)(1)(A) is simply irreconcilable with *Perko*, 373 U.S. at 707.

Under the *Garmon* doctrine the state courts are not ousted of jurisdiction over activity which "touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." (*Farmer v. Carpenters*, 430 U.S. 290, 296-297, quoting *Garmon*, 359 U.S. at 243-244).

But as *Perko* and *Borden* make clear, the tort of interference with contractual relations does not qualify for that exception. The contrary view below is based, as we show, on a misreading of this Court's decisions, most notably *Farmer* and *Linn v. Plant Guard Workers*, 383 U.S. 53.

The Georgia court's reliance on the fact that the NLRB is not empowered to award punitive damages or attorneys' fees is likewise misplaced. For example, the Court made clear in *Farmer* that the state courts, while retaining jurisdiction over suits for outrageous infliction of emotional distress in the context of a labor dispute, are without power to grant any form of relief for loss of employment which was caused in violation of the NLRA. Indeed, the availability under Georgia law of remedies that are not provided in § 10(c) of the NLRA is one of the conflicts with Congressional policy which the *Garmon* preemption doctrine is designed to prevent. See 359 U.S. at 243, 246-247.

Finally, the court below erred in rejecting the defendants' reliance on *Sears*, 436 U.S. at 197, which holds the critical inquiry to be "whether the controversy presented to the state court is identical to * * * or different from * * * that which could have been * * * presented to the Labor Board." The Georgia court said that "Permitting the state court to adjudicate Jones' tort claim would create no realistic risk of a conflict with the Labor Board's determination that there had been no unfair labor practices under § 8(b)(1)(B)." (J.S. 6a). But since plaintiff's tort claim is based on the allegation that the union coerced the employer into discharging him, he is asking the state court to decide in his favor the identical issue which the Regional Director has already decided against him. The conflict could not be clearer.

ARGUMENT

THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT ESTABLISHING THE SCOPE OF STATE COURT JURISDICTION OVER LABOR DISPUTES SUBJECT TO THE NATIONAL LABOR RELATIONS ACT, AS AMENDED

Introduction

Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180 ("*Sears*"), this Court's most recent decision on the preemptive effect of the National Labor Relations Act, as amended, summarized the rules for determining the extent of state court jurisdiction over labor disputes subject to the NLRA:

> In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, the Court made two statements which have come to be accepted as the general guidelines for deciphering the unexpressed intent of Congress regarding the permissible scope of state regulation of activity touching upon labor-management relations. The first related to activity which is clearly protected or prohibited by the federal statute.[11] The second articulated a more sweeping prophylactic rule:
>
> > "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the dan-

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[11] As to conduct clearly protected or prohibited by the federal statute, the Court stated:

"When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." 359 U.S., at 244.

> ger of state interference with national policy is to be averted." *Id.*, at 245.

While the *Garmon* formulation accurately reflects the basic federal concern with potential state interference with national labor policy, the history of the labor pre-emption doctrine in this Court does not support an approach which sweeps away state-court jurisdiction over conduct traditionally subject to state regulation without careful consideration of the relative impact of such a jurisdictional bar on the various interests affected. As the Court noted last Term:

> "Our cases indicate . . . that inflexible application of the doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." *Farmer v. Carpenters*, 430 U.S. 290, 302.

[436 U.S. at 187-188, other footnote omitted.]

In this instance, that "careful consideration" has already been undertaken and the judgment that federal law controls has already been made. For, this case is squarely controlled by this Court's decision in *Iron Workers v. Perko*, 373 U.S. 701.

A. The Decision Below Is Contrary To *Iron Workers v. Perko*, 373 U.S. 701

Because of its central and indeed controlling significance to this case, we shall describe in detail Justice Harlan's opinion for this Court in *Perko*. We begin with Justice Harlan's statement of the case:

> [Perko] alleged that for several years he had been a member in good standing of the iron workers local and had been employed "as a foreman" by the William B. Pollock Company; that the defendants without justification had conspired to deprive him of the right to continue to work "as a foreman"; that pur-

> suant to this conspiracy they had demanded that the company discharge him from his duties "as superintendent and foreman"; that as a result he had been discharged, and defendants had since prevented him from obtaining work "as a foreman in ironwork by representing that plaintiff's foreman's rights had been suspended"; and that he was entitled to damages for past and future loss of earnings in the amount of $75,000. [373 U.S. at 702-703.]

The trial court had dismissed the complaint. The Supreme Court of Ohio reinstated that complaint, characterizing the cause of action stated as one alleging that the defendants had "committed a common-law tort against [Perko] by conspiring to deprive him of his right to earn a living and interfering with his contract of employment * * *" (373 U.S. at 703, quoting 168 Ohio St. 161 at 162, 151 N.E. 2d 742 at 744). Thereafter, Perko secured a judgment in the state court for $25,000. This Court reversed.

At the outset of his analysis for the Court, Justice Harlan observed that for the reasons explained in the companion case of *Plumbers' Union v. Borden*, 373 U.S. 690, Perko's reliance on *Machinists v. Gonzales*, 356 U.S. 617 was misplaced. In *Perko* as in *Borden*, "the crux of the action * * * concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters." (373 U.S. at 705.)

Justice Harlan then turned to Perko's contention that "the exercise of state jurisdiction is not precluded because the matter is clearly not subject to the Labor Board's cognizance." (*Id.*) The basis of this contention was Perko's "claim that he was a job superintendent, and thus a 'supervisor' within the meaning of the Act, at the time of the alleged tort and that he was thus excluded from the scope, operation, and protection of federal law." (*Id.*, footnote omitted.) Cf. respondent Jones' position here, urging that the "key fact is the plaintiff's *employment status*." (Motion to Dismiss or Affirm, 13, emphasis in

original.) But the Court concluded in *Perko* that there are "two independent and conclusive answers to this argument, both of which establish that this matter falls squarely within the preemption principles declared in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236." (373 U.S. at 706).

First, the Court concluded that because Perko's allegations concerned his employment both in a superintendent's position and in a foreman's position with limited responsibilities that could be from the record evidence classified in either the "employee" or "supervisor" category for NLRA purposes, the case presented "difficult problems of definition of status, problems which [this Court has] held are precisely 'of a kind most wisely entrusted initially to the [NLRB].'" (373 U.S. at 706, quoting *Marine Engineers' v. Interlake Co.*, 370 U.S. 173, 180). Those problems were of moment because if Perko had filed a charge and if the Board had concluded that Perko was a statutory "employee" his claim would have been squarely within §§ 8(b)(1)(A) & 8(b)(2) of the Act. In that event, state court jurisdiction over that claim would have been precluded under the reasoning of *Borden*. (373 U.S. at 706-707.) We do not rely on that answer here, because it is not contested that the employment involved in appellee's claim would have been as a statutory "supervisor".

Second, the Court held that "even if it be assumed that Perko was not an employee but was solely a supervisor, there is a sufficient probability that the matter would still have been cognizable by the Board so as to compel the relinquishment of state jurisdiction." (*Id.* at 707). This conclusion was based on two separate points of statutory analysis.

The Court first adverted to decisions holding "that discharge of a supervisor for failure effectively to coerce employees into renouncing their union affiliation constitutes a violation of § 8(a)(1) because such a discharge would reasonably cause nonsupervisory employees to fear

that they might meet the same fate if they adhered to the union;" and noted that under that line of authority, supervisors have been reinstated with back pay. By the same token

> a union's insistence on discharge of a supervisor for failure to comply with union rules would violate § 8(b)(1)(A) because it would inevitably tend to coerce nonsupervisory employees into observing those rules. If so, it would surely be within the Board's power under § 10(c) to order the union to reimburse the supervisor for lost wages. [373 U.S. at 707.] [6]

Additionally, the Court in *Perko* determined that the conduct that was the basis of the state court claim was arguably a violation of § 8(b)(1)(B):

> Moreover, if a union forces an employer to discharge a supervisor, such conduct may well violate § 8(b)(1)(B) because it coerces the "employer in

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[6] It should be noted too in this connection that the Board has also "reasoned that, because workers in the construction industry frequently cycle in and out of supervisory jobs, discrimination against [an individual] in his attempt to become a supervisor would carry over to intimidate him once he again became a statutory employee." (*NLRB v. Local Union No. 725, Etc.*, 572 F.2d 550, 552 (C.A. 5) enforcing 225 NLRB 138. See also *Plumbers Local 137 (Hames Construction & Equipment Co.)* 207 NLRB 359.) This doctrine is particularly apposite to appellee's allegations in this case which, of course, arises in the construction industry. Cf. the Board's § 8(b)(1)(B) analysis, approved by this Court, that supervisors disciplined by a union for performing supervisory duties during a strike would have "a diminished capacity to carry out their grievance-adjusted duties effectively" because they "might be tempted to give the union side of a grievance a more favorable slant while the threat of discipline remained, or while [their] own appeal of a union sanction was pending." (*American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 434-435.)

In *Parker-Robb Chevrolet, Inc.*, 262 NLRB No. 58, 110 LRRM 1289 (June 23, 1982) a divided NLRB narrowed the class of cases in which it would find that the discharge of a supervisor violated § 8(b)(1)(A). That decision, however, reaffirmed *Labor Board v. Talladega Cotton Factory, Inc.*, 213 F.2d 209 (C.A. 5), which had been cited by the Court in *Perko*. It also left undisturbed the construction industry line of cases discussed above.

> the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Cf. *International Typographical Union v. Labor Board*, 278 F.2d 6, aff'd in part by an equally divided Court, 365 U.S. 705; *Labor Board v. Local 294, International Brotherhood of Teamsters*, 284 F.2d 893. Whether a "job superintendent" like Perko has sufficient responsibilities with regard to grievances to bring this section into play cannot be ascertained on this record, and in any event would be a question for initial determination by the Board. But the probability that such a violation of § 8(b)(1)(B) might have occurred, especially in view of Perko's role in the interunion dispute that gave rise to the present controversy, is certainly not insignificant. [373 U.S. at 708.]

The Court concluded:

> We do not of course intimate any view on the merits of any of the underlying substantive questions, that is, whether the union was guilty of a violation of the Act. It is enough to hold, as we do, that it is plain on a number of scores that the subject matter of this lawsuit "arguably" comes within the Board's jurisdiction to deal with unfair labor practices. We therefore conclude that the State must yield jurisdiction and the judgment below must be *Reversed.*
>
> [*Id.*]

We submit that the foregoing allows no doubt that *Perko* controls this case. Jones' claim of employment discrimination, like Perko's, arguably states a violation of §§ 8(b)(1)(A) and 8(b)(1)(B) of the NLRA—as indeed Jones recognized in the unfair labor practice charge he filed. (J.S. 25a.) The court below should therefore have affirmed the trial court's dismissal for want of jurisdiction.

B. The Grounds Given By The Court Below For Asserting Jurisdiction Are Without Merit

1. It is fitting that we begin our discussion of the opinion of the court below with its attempt to distinguish

this case from the *Perko* case. That court acknowledged the *Perko* Court's reliance on § 8(b)(1)(B) but said:

> However, Perko involved a union member classified as a foreman, whose status as an "employee" fluctuated and who may have had sufficient responsibilities with regard to grievances to bring § 8(b)(1)(B) into play. Such a question would be determined by the Board. In the instant case the regional director has already determined and indicated in his letter that there had been no coercion of the employer in the selection of its representative for the purpose of collective bargaining under § 8(b)(1)(B). [J.S. 8a.]

If the foregoing is intended to attribute to the NLRB Regional Director a determination that Jones, although a supervisor, did not enjoy a status protected by § 8(b)(1)(B), the court below misread his decision, for the Director did not so determine.[7] The dismissal of Jones' charge was based on conclusion that the

> evidence was insufficient to establish that the union caused [Jones'] discharge or that it restrained or coerced the Employer in the selection of its representative for the purposes of collective bargaining; [r]ather, it appears that the Employer implemented certain changes in its supervisory structure which included your removal from the project. [J.S. 26a, quoted in its entirety at p. 3, *supra*.]

Thus the Regional Director concluded that the Union had not taken any action barred by § 8(b)(1)(B), not that Jones is outside the class of individuals protected by that section.

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[7] We of course agree that the statutory categories of "supervisor" and employer "representative[]" for the purposes of collective bargaining or the adjustment of grievances are not congruent. (See *Florida Power & Light v. Electrical Workers*, 417 U.S. 790, 811, n. 21.) And we likewise agree, indeed insist given *Perko*, that it is the Board's function to determine whether a particular supervisor is also a § 8(b)(1)(B) representative. But as we show in the text, the Board did not determine that Jones was not a § 8(b)(1)(B) representative.

Indeed, even if the Regional Director had dismissed Jones' charge on the ground that he was not a § 8(b)(1)(B) representative, the court below would be in error in asserting jurisdiction on that basis. By failing to appeal from the Regional Director's dismissal of his charge, Jones made it impossible for the NLRB's General Counsel to make a final determination of Jones' employment status. It would be wholly inconsistent with the remedial scheme established under the NLRA to allow a party to base a state court claim on his contention that the conduct against which he complains is not even arguably an unfair labor practice where that party has prematurely terminated the procedures Congress has made available to determine whether that conduct is or is not, unlawful under the NLRA. Such a result would place a premium on a charging party's decision *not* to exhaust his NLRA remedies.

If, on the other hand, the Georgia court was saying that the Regional Director's determination was a conclusive determination that no violation of § 8(b)(1)(B) had been committed, the statement is correct (given Jones' failure to appeal the Regional Director's decision) but is a legally insufficient basis for distinguishing *Perko* and asserting jurisdiction of Jones' claim. For the "exclusive competence of the National Labor Relations Board" (*Garmon*, 359 U.S. at 245) does not give way to state court jurisdiction once the agency has concluded that an unfair labor practice has or has not been committed. Rather, the governing rule is that stated in *Sears*:

> The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to (as in *Garner*) or different from (as in *Farmer*) that which could have been, but was not, presented to the Labor Board. For it is only in the former situation that a state court's exercise of jurisdiction necessarily involves a risk of interference with the unfair labor practice jurisdiction of the

> Board which the arguably prohibited branch of the *Garmon* doctrine was designed to avoid. [436 U.S. at 197, footnote omitted.] [8]

In this case, "the controversy presented to the state court is identical" to the § 8(b)(1)(B) claim presented to the Regional Director. Both turn on the claim that the Union sought to prevent Superior Consolidated from employing Jones as an equipment maintenance superintendent because Jones had resigned from the Union.

As to the significance of § 8(b)(1)(A), the Georgia Court of Appeals said only:

> With regard to an unfair labor practice charge under § 8(b)(1)(A), "'It has long been recognized that supervisors are not entitled to the protection afforded "ordinary employees" under the Act, and that "as to supervisors there can be no such thing as a discriminatory discharge or an unfair labor practice." [Cits.]'" *International Brotherhood v. Briscoe*, *supra* p. 425 [J.S. 8a]

The foregoing disregards, rather than distinguishes *Perko*. For *Perko* recognized that the discharge of a supervisor may violate § 8(b)(1)(A), and that the Board may order the union to reimburse the supervisor for lost wages, though the court was of course aware that supervisors themselves enjoy no § 7 rights. (373 U.S. at 707, quoted at pp. 16-17, *supra*. See also *Florida Power & Light v. Electrical Workers*, 417 U.S. at 808, n. 18.)

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[8] For the reasons stated at pp. 19-20, *supra*, Jones, having short-circuited the Board proceeding, can be no better off than a state court plaintiff who has not invoked the Board processes at all. However, we note for the sake of completeness that although the above passage refers to a controversy "which could have been but *was not* presented to the Labor Board" (emphasis added), its analysis applies equally where the controversy has been presented to the Board. That is established by *Farmer v. Carpenters*, 430 U.S. 290, where the controversy over the legality of the union's hiring hall practices had been presented to the Board, and the plaintiff was precluded from relitigating that claim in the state court, see p. 31, *infra*.

2. The court below relied on its own prior decisions in *Sheet Metal Workers International v. Carter*, 133 Ga. App. 872, 212 S.E. 2d 645, cert. den., 423 U.S. 1078 (*"Carter"*) and *International Brotherhood v. Briscoe*, 143 Ga. App. 417, 239 S.E. 2d 38 (*"Briscoe"*). *Carter* was a suit for tortious interference with employment brought by an NLRA "employee;" *Briscoe*, like this case, was a similar tort action by an NLRA "supervisor". In both cases the court below sustained state court jurisdiction notwithstanding the *Garmon* rule.

In its opinion herein, the court below quoted with approval the statement of the *Carter* court "that there are situations in which state court jurisdiction is appropriate and has been recognized by the Supreme Court of the United States where conduct touches interests 'deeply rooted in local feelings and responsibility.'" (J.S. 3a, quoting 133 Ga. App. at 874, 212 S.E. 2d at 647, in turn quoting from *Garmon*, 359 U.S. at 244). The paragraph in *Garmon* from which the court below quoted reads in full as follows:

> Administration is more than a means of regulation; administration is regulation. We have been concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy, and administration. Thus, judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted. When the exercise of state power over a particular area of activity threatened interference with the clearly indicated policy of industrial relations, it has been judicially necessary to preclude the States from acting. However, due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power not as a matter of doctrinaire localism but as a promoter of democracy, has required us not to find withdrawal from the States of power to regulate wnere the activity regulated was a merely peripheral concern of the Labor

> Management Relations Act. *See International Assn. of Machinists v. Gonzales*, 356 U.S. 617. Or where the regulated conduct touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act. [359 U.S. at 243-244.]

The pithy insight of the first sentence of the paragraph just quoted draws the essence from the preceding discussion in *Garmon* which in turn is based on and incorporates Justice Jackson's classic opinion for a unanimous Court in *Garner v. Teamsters Union*, 346 U.S. 485:

> In determining the extent to which regulation must yield to subordinating federal authority, we have * * * necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, one federal the other state, of inconsistent standards of substantive law and differing remedial schemes. But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience:
>
> > "Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety

> of local procedures and attitudes towards labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. . . ." *Garner v. Teamsters Union*, 346 U.S. 485, 490-491. [359 U.S. at 241-243.]

And the *Garmon* opinion concludes by stating the basis for the "local feeling and responsibility" exception:

> It is true that we have allowed the States to grant compensation for the consequences, as defined by the traditional law of torts, of conduct marked by violence and imminent threats to the public order. *United Automobile Workers v. Russell*, 356 U.S. 634; *United Construction Workers v. Laburnum Corp.*, 347 U.S. 656. We have also allowed the States to enjoin such conduct. *Youngdahl v. Rainfair*, 355 U.S. 131; *Auto Workers v. Wisconsin Board*, 351 U.S. 266. State jurisdiction has prevailed in these situations because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction. [359 U.S. at 247.]

Garmon itself then leaves no room for the Georgia court's supposition that the state common law tort of interference with contractual relations survives enactment of the NLRA as a basis for regulating the labor-management relations also regulated by the NLRA. For, as this case shows, that body of tort law governs the interplay between employers and unions concerning employment matters that Congress has regulated in detail in the national labor laws and does so through "inconsistent standards of substantive law and differing remedial schemes" (359 U.S. at 242). And, that tort law does not serve a "compelling state interest" such as "maintenance of domestic peace", completely compatible with the basic premises of the NLRA, but rather embodies a concept of the public interest in labor relations substantially at odds with those

premises—a concept Congress was intent to displace by legislating in this field.

Historically the tort of interference with contractual relations has been utilized by courts to implement their own notions of labor relations policy. Justice Holmes made this precise point in his celebrated dissenting opinion in *Vegelahn v. Guntner*, 167 Mass. 92, 44 N.E. 1077.[9] In *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, the Court (over the dissent of Justice Brandeis, joined by Justices Holmes and Clarke) invoked this tort to establish union liability for interfering with a "yellow-dog" contract whereby the employer had required every

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[9] Justice Holmes wrote:

> I agree, whatever may be the law in the case of a single defendant, * * * that when a plaintiff proves that several persons have combined and conspired to injure his business, and have done acts producing that effect, he shows temporal damage and a cause of action, unless the facts disclose, or the defendants prove, some ground of excuse or justification. And I take it to be settled, and rightly settled, that doing that damage by combined persuasion is actionable, as well as doing it by falsehood or by force. * * *
>
> Nevertheless, in numberless instances the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to a justification, and more especially on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capableof unanswerable proof. They require a special training to enable any one even to form an intelligent opinion about them. In the early stages of law, at least, they generally are acted on rather as inarticulate instincts than as definite ideas for which a rational defence is ready. [167 Mass. at 105-106, citations omitted]

See also, Holmes, *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 8-9 (1894).

employee to agree not to join a union. *Hitchman* was probably the major example in this Court of the "judge-made [labor] law of the late 19th and 20th centuries [which] was based on self-mesmerized views of economic and social theory * * *." *Railroad Trainmen v. Terminal Co.*, 394 U.S. 369, 382 (Harlan, J.).[10]

The foregoing discussion elaborates that which this Court has already decided. For *Perko* and its companion case *Borden* are again directly in point, in that, as already mentioned, this Court in both applied *Garmon* to preclude state jurisdiction of just such tort claims. That Justice Harlan did not overlook the "local feeling and

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[10] See F. Frankfurter and N. Greene, *The Labor Injunction* (1930), especially at 35-39, and W. W. Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 Yale L.J. 779 (1918). The latter article is a masterful dissection of the *Hitchman* opinion, utilizing Hohfeldian analysis as the instrument. Professor Cook's principal thesis is that "the decision in a novel situation such as that presented in the [*Hitchman*] case must turn upon the notions of policy which the judges who are deciding the case may entertain." (*Id.* at 800). See also especially *id.* at 783, 788-790, 791, 795. Professor Cook concludes in a remarkable passage:

> Whether our courts will show themselves competent to settle rightly the questions of policy involved is perhaps doubtful. If not, we have our legislative bodies to fall back upon. In making our decision, we shall have to bear in mind that if we do not give organized labor a fair chance to assert itself in competition with organized capital in this "free struggle for life," the only alternative will be a larger and larger measure of direct governmental interference in fixing wages and conditions of employment. On the other hand if we do give to the unions the free hand they ask, we may find it necessary by statute to surround them with legal regulations as to conditions of membership, etc., which may not be altogether acceptable. Which method will in the long run prove most conducive to the welfare of the community is, as stated above, a question with the answer to which the present writer is not at this time primarily concerned. [Id at 800-801, footnotes omitted.]

The ultimate resolution was, of course, legislation by Congress, in the exercise of the Commerce power, declaring a *national* labor policy.

responsibility" exception is made plain by his statement of the rule at the outset of his analysis in *Borden*:

> This Court held in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, that in the absence of an overriding state interest such as that involved in the maintenance of domestic peace, state courts must defer to the exclusive competence of the National Labor Relations Board in cases in which the activity that is the subject matter of the litigation is arguably subject to the protections of § 7 or the prohibitions of § 8 of the National Labor Relations Act. [373 U.S. at 693.]

Nor do *Linn v. Plant Guard Workers*, 383 U.S. 53 and *Farmer v. Carpenters*, 430 U.S. 290, which respectively extended the "local feeling and responsibility" exception beyond violence to defamation and to intentional infliction of emotional distress by outrageous conduct provide any support for the decision below. In their discussion of this exception both cases cited *Borden* with approval. (See *Linn*, 383 U.S. at 59-60, and *Farmer*, 430 U.S. at 300, n.9.) Moreover, even if this were an issue of first impression, the Georgia court's assertion of jurisdiction over tortious interference with an employment contract could not stand.

In *Linn* and *Farmer* the conclusion that the state had an overriding interest "deeply rooted in local feeling and responsibility" was not deemed sufficient to sustain state jurisdiction over the particular torts at issue. Rather, that conclusion was one of "a number of factors" that together justify the determination that the NLRA does not preempt the determination state jurisdiction. (*Farmer*, 430 U.S. at 299.) This is shown by *Farmer's* description of *Linn*:

> But a number of factors influenced the Court to depart from the *Garmon* rule. First, the Court noted that the underlying conduct—the intentional circulation of defamatory material known to be false—was not protected under the Act, 383 U.S., at 61, and there was thus no risk that permitting the state

cause of action to proceed would result in state regulation of conduct that Congress intended to protect. Second, the Court recognized that there was " 'an overriding state interest' " in protecting residents from malicious libels, and that this state interest was " 'deeply rooted in local feeling and responsibility.' " *Id.*, at 61, 62. Third, the Court reasoned that there was little risk that the state cause of action would interfere with the effective administration of national labor policy. The Board's § 8 unfair labor practice proceeding would focus only on whether the statements were misleading or coercive; whether the statements also were defamatory would be of no relevance to the Board's performance of its functions. *Id.*, at 63. Moreover, the Board would lack authority to provide the defamed individual with damages or other relief. *Ibid.* Conversely, the state-law action would be unconcerned with whether the statements were coercive or misleading in the labor context, and in any event the court would have power to award Linn relief only if the statements were defamatory. Taken together, these factors justified an exception to the pre-emption rule. [430 U.S. at 298-299.]

So, too, in dealing with the complaint of Farmer's decedent, the original plaintiff Hill, the Court said:

Viewed, however, in light of the discrete concerns of the federal scheme and the state tort law, that potential for interference [with federal law] is insufficient to counterbalance the legitimate and substantial interest of the State in protecting its citizens. If the charges in Hill's complaint were filed with the Board, the focus of any unfair labor practice proceeding would be on whether the statements or conduct on the part of Union officials discriminated or threatened discrimination against him in employment referrals for reasons other than failure to pay Union dues. * * * . Whether the statements or conduct of the respondents also caused Hill severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award Hill damages for pain, suffer-

> ing, or medical expenses. Conversely, the state-court action can be adjudicated without resolution of the "merits" of the underlying labor dispute. Recovery for the tort of emotional distress under California law requires proof that the defendant intentionally engaged in outrageous conduct causing the plaintiff to sustain mental distress. * * * The state court need not consider, much less resolve, whether a union discriminated or threatened to discriminate against an employee in terms of employment opportunities. To the contrary, the tort action can be resolved without reference to any accommodation of the special interests of unions and members in the hiring hall context. [430 U.S. at 304-305; citations omitted.]

In the present case, by contrast, the determination whether the Union had coerced the Employer into discharging Jones was an issue which the NLRB not only could determine but which, by its nature, is central to the Board's determination whether there is a § 8(b)(1)(A) or § 8(b)(1)(B) unfair labor practice. Conversely, as appears from the complaint itself, the state court could not adjudicate plaintiff's tort claim without deciding the very issue which Congress has committed to the Board. Of course, this is not due to any peculiarity of respondent Jones' claim. As *Perko* and *Borden* also illustrate, it is inherent in the very nature of the tort, which focuses on the acquisition and retention of employment. Congress systematically determined to what extent unions may or may not interfere with employment relationships, and vested the Labor Board with exclusive jurisdiction to implement the Congressional policy. Thus, where a union is charged with tortious interference with an employment relationship, that allegation will inevitably create a controversy identical to one which could be presented to the Labor Board—a controversy that is therefore withdrawn by the NLRA from state court jurisdiction. (See, e.g., *Sears*, 436 U.S. at 197, quoted at pp. 20-21, *supra*.)

The court below also reaffirmed that portion of its *Carter* opinion that had relied on the fact that the re-

medial provision of the NLRA—§ 10(c)—"does not include power to award exemplary damages or attorney fees." (J.S. 6a.) But the Court explained in *Garmon*:

> Nor is it significant that California asserted its power to give damages rather than to enjoin what the Board may restrain though it could not compensate. Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. See *Garner v. Teamsters Union*, 346 U.S. 485, 492-497. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern. *In fact, since remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the National Labor Relations Board only accentuates the danger of conflict.* [359 U.S. at 246-247 (emphasis added).]

And here again the Georgia court's view is inconsistent with *Linn* and *Farmer*. Those cases relied, *in conjunction with the other factors stated*, on the Board's total inability to provide *any* remedy for loss of reputation (*Linn*) and for emotional distress and anxiety (*Farmer*). See, in addition to the passages already quoted at pp. 27-28 and 28-29, *supra*, 430 U.S. at 302 ("Regardless of

whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct on the part of union officers which is so outrageous that 'no reasonable man in a civilized society should be expected to endure it.' ")

Farmer holds also that the "risk that the jury verdict represented damages *for employment discrimination* rather than for instances of intentional infliction of emotional distress precludes reinstatement of the judgment of the" trial court (430 U.S. at 306-307, emphasis added). The trial court had instructed the jury "that the National Labor Relations Board would not have jurisdiction to compensate petitioner for injuries such as emotional distress, pain and suffering and medical expenses nor would it have authority to award punitive damages" and "a verdict of $7,500 actual damages and $175,000 punitive damages" had been returned (*id.* at 294). Thus, if the inadequacy of Labor Board remedies were a sufficient ground for preserving state court jurisdiction over conduct which is, or may be, an unfair labor practice, the judgment on the jury verdict in *Farmer* would not have been disapproved by this Court.

The short of the matter is that the difference between federal and state remedies for the same injury—loss of employment—does not support state jurisdiction of a conduct regulated by the NLRB; rather it is one of the reasons why that agency's "exclusive competence" must be respected. *Garmon* was "concerned with conflict in its broadest sense; conflict with a complex and interrelated federal scheme of law, remedy and administration." (359 U.S. at 243.) Cf. *Teamsters Union v. Morton*, 377 U.S. 252, 260-261.

3. Lastly, it is clear that the court below erred in rejecting the union's reliance on *Sears*, and specifically on the passage in 436 U.S. at 197, set forth at pp. 20-21, *supra*. The court below said:

> However, the court in Sears goes on to distinguish between the controversy which might have been pre-

> sented to the Board and that which was presented to the state court. The federal and state issues were "completely unrelated" to the simple question of state law involved. Similarly, the federal issue here is whether the Union has committed an unfair labor practice by coercing an employer in the selection of the employer's representatives for purposes of collective bargaining. In the state action, Jones alleges that the Union interfered with his contract of employment with Georgia Power and suffered damage thereby. Permitting the state court to adjudicate Jones' tort claim would create no realistic risk of a conflict with the Labor Board's determination that there had been no unfair labor practices under § 8(b)(1)(B). *Id.*, at 198. [J.S. 5a-6a]

Since, as previously shown, plaintiff's tort claim is based on the allegation that the union coerced the employer into discharging him, he is asking the state court to decide in his favor the identical issue which the Regional Director has already decided against him. The conflict could not be clearer.

CONCLUSION

For the above-stated reasons, the decision below should be reversed with instructions to reinstate the trial court's order dismissing the complaint.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1257 provides as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

28 U.S.C. § 2103 provides as follows:

> If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears

to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

National Labor Relations Act, as amended, 49 Stat. 449, 61 Stat. 136, 29 U.S.C. §§ 141 *et seq.* provides in pertinent part as follows:

> § 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> § 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> > (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;
>
> * * * *
>
> § 10(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law,

or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecing commerce unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this act or has received a construction inconsistent therewith.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint:

* * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: * * *

Appellee's Brief

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No. 81-1574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO and TOMMIE D. ARCHER,
Appellants

v.

ROBERT C. JONES,
Appellee

ON APPEAL FROM THE COURT OF APPEALS OF GEORGIA

BRIEF FOR APPELLEE

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QUESTIONS PRESENTED

1. Is a *Supervisor's* state court action against a labor union (for tortious interference with his contract of employment) preempted by the National Labor Relations Act, even though federal authorities previously dismissed his unfair labor practice charge because there was insufficient evidence that the union's actions coerced persons actually protected by the Act?

2. Is an unfair labor practice proceeding under the National Labor Relations Act the *exclusive* method by which a Supervisor may obtain relief for a labor union's tortious interference with his contract of employment, where Congress specifically removed Supervisors from the direct protections of the Act?

PARTIES TO THE PROCEEDINGS

Robert C. Jones	Plaintiff-Appellee
Local 926, International Union of Operating Engineers	Defendant-Appellant
T. D. Archer	Defendant-Appellant
Georgia Power Company	Defendant below

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v

ROBERT C. JONES,
Appellee

ON APPEAL FROM THE COURT OF APPEALS OF GEORGIA

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Factual Background

In mid-1977, Georgia Power Company (hereinafter "Georgia Power") resumed construction on its Plant Scherer power plant using workers represented by various construction unions, including the appellant Local 926, International Union of Operating Engineers (hereinafter "Local 926").[1] The collective bar-

[1] Appellant-defendant (hereinafter "defendant") Tommie D. Archer is the Secretary-Treasurer of Local 926 and has effectively controlled Local 926 for the past thirty-three years.

gaining agreement between Georgia Power and the construction unions specifically provided that Georgia Power, and its subcontractors, were free to select their "supervisors" without the approval of the union.

During late 1977 and early 1978, Georgia Power began experiencing problems with equipment maintenance at Plant Scherer. These problems were traced to the lack of proper supervision in the equipment maintenance facility. After a series of meetings with Local 926 failed to improve the situation, Georgia Power decided to create a new supervisory position to oversee the operations of the equipment maintenance facility at Plant Scherer and began searching for a qualified supervisor (A. 115-116, 118).

At this time, the plaintiff-appellee (hereinafter "plaintiff") was employed by Daniels Construction Company, serving as its Superintendent of Equipment Maintenance at the Plant Wamsley power plant construction site. Because Plant Wamsley was being built for Georgia Power, its officials were already aware of the high quality of plaintiff's work. They contacted him to see if he would leave his job with Daniels Construction and come to Plant Scherer as their Superintendent of Equipment Maintenance, *a supervisory position.* The plaintiff was told that construction on Plant Scherer would last for 8 to 10 years and that he would be carried on the payroll of Georgia Power's labor broker. The plaintiff was also told that he would *not* have to be a member of Local 926 (A. 49-51).[2]

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[2] The plaintiff was a former member of the defendant Local 926. During the 1974 recession in the construction industry, the plaintiff and many other members of Local 926 were out of work for

The plaintiff was invited to Plant Scherer to meet with key management personnel. During this visit the final terms of his employment were worked out and he returned to his job and gave notice to Daniels Construction (A. 52-56). On Friday, June 9, 1978, the plaintiff terminated his employment with Daniels and proceeded to Plant Scherer, reporting for work the next Monday—June 12, 1978 (A. 56-60).

On the afternoon of his arrival at Plant Scherer, a Georgia Power supervisor took the plaintiff by the labor broker's office to have him put on the payroll. The labor broker informed the supervisor that he would have to check with the defendant Archer at Local 926. The Georgia Power supervisor told the labor broker that Archer's permission was not required since Local 926 did not have any say in who Georgia Power hired as supervisors. The labor broker just reiterated that he would have to check with Archer. The Georgia Power supervisor then notified the Project Manager who said he would look into the matter (A. 63, 129-130, 133-135).

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many months. After approximately five months of unemployment the plaintiff, *through his own efforts,* found employment with a construction firm in Chamblee, Georgia. He contacted Local 926 through the defendant Archer, and notified them that he had found a job and should be taken off the "out-of-work" list.

Archer told the plaintiff that he could *not* have the job because there were other members of Local 926 with a higher priority. The plaintiff was very upset and had "words" with Archer. The plaintiff quit paying union dues and went to work for one of the largest non-union contractors in the South, Daniels Construction Company. (A. 32-33, 37-40).

The next day, the plaintiff learned that Local 926 had objected to his employment. It was agreed that the plaintiff would take the rest of the week off while Georgia Power checked out the problem with Local 926 (A. 65-68). During his week off, the plaintiff contacted the defendant Archer and asked why the Union objected to his employment. Archer told him that he didn't want the plaintiff down there telling his men what to do after he had left the Union and gone to a non-union job (A. 72-73).

On June 20, 1978, Georgia Power officials held a meeting with the labor broker, the defendant Archer and other officials of Local 926 to discuss the problem (A. 136-137). The plaintiff was informed that the meeting would take place and waited outside the conference room waiting to be called into the meeting (A. 74-76). He was never called and did not participate in the meeting. During the meeting it became apparent to Georgia Power officials that there would be labor unrest if the plaintiff remained in a supervisory position over members of Local 926 (A. 139-145). Georgia Power decided to drop the new supervisory position and replace the present Master Mechanic with a more experienced Master Mechanic supplied by Local 926 (A. 138-139). Following this meeting a Georgia Power official informed the plaintiff that they were sorry, but his services were no longer required (A. 77-78).

Procedural History

A week after being discharged by Georgia Power, the plaintiff filed unfair labor practice charges with Region 10 of the National Labor Relations Board

(hereinafter "Board"). These charges alleged that Local 926 violated sections 8(b)(1)(A) and (B) of the National Labor Relations Act (hereinafter "NLRA" or the "Act")[3] when it

> caused and procured the discharge of Robert C. Jones, and thereby coerced the employer . . . in the selection of its supervisors and bargaining representative, because said individual had not been a member in good standing of said labor organization.

(J.S. App. 25a).

One month later, following an investigation by a Board agent, the Regional Director notified the plaintiff that

> [a]s a result of the investigation, it does not appear that further proceedings on the charge are warranted. The Region concluded that the evidence was insufficient to establish that the Union caused your discharge or that it restrained or coerced the Employer in the selection of its representative for the purposes of collective bargaining. Rather, it appears that the Employer implemented certain changes in its supervisory structure which included your removal from the project. While the Union did participate in discussions regarding the changes, there was no evidence that it engaged in any unlawful conduct regarding your status as a supervisor. I am, therefore, refusing to issue complaint in this matter.
>
> Form NLRB-4938, Procedure for Filing an Appeal, is attached. The appeal period expires at the close of business on August 1, 1978. (J.S. App. 26a).

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[3] The pertinent parts of the Act, 29 U.S.C. § 151 *et seq.* (1976), are reproduced in the Statutory Appendix to this Brief.

Lacking any additional evidence of Local 926 coercion, the plaintiff did not bother to make a futile appeal to the Board's General Counsel.

Following the dismissal of his unfair labor practice charges, the plaintiff obtained legal counsel and the present lawsuit was filed in the State Court of Fulton County, Georgia, alleging: (1) that defendants Local 926 and Archer tortiously interfered with his contract of employment, and (2) that Georgia Power Company violated the Georgia right-to-work statute by discharging him because he was not a member in good standing of Local 926.[4]

The defendants filed a Joint Motion to Dismiss arguing that plaintiff's claims were preempted by

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[4] Although plaintiff's counsel was aware of this Court's holding in *Beasley* v. *Food Fair of North Carolina, Inc.*, 416 U.S. 653 (1974) (NLRA § 14(a) preempts state right-to-work claims of supervisors who were discharged because they were members of the union), it was believed distinguishable because the plaintiff in this case was a "non-union" supervisor. The rationale being that if a labor union could force an employer to refrain from using "non-union" supervisors it could effectively defeat Congress' intent in passing § 14(a), i.e., employer has the right to ensure the loyalty of its supervisors by not requiring it to employ union supervisors who may have divided loyalties.

Although this rationale is at odds with the literal wording of § 14(a), this Court has held "that a thing may be within the letter of the statute and yet not governed by the statute, because not within the intent of its makers." *Holy Trinity Church* v. *United States*, 143 U.S. 457 (1892); *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 619 (1967); *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616, 618 (1975); *Muniz* v. *Hoffman*, 422 U.S. 454, 469 (1975).

This issue is not before the Court because the Georgia Court of Appeals sustained the dismissal of the right-to-work claim against the employer on a non-federal ground (employment-at-will).

the NLRA. The trial court granted their motion and plaintiff appealed to the Georgia Court of Appeals. That court sustained the dismissal of Georgia Power on two grounds (1) federal preemption by NLRA § 14(a), and (2) the state's employment-at-will doctrine. However, the court of appeals, after reviewing this Court's preemption decisions, reversed the trial court's dismissal of defendants Archer and Local 926.

Following unsuccessful petitions for rehearing to the court of appeals and writ of certiorari to the Georgia Supreme Court, the defendants sought review in this Court by invoking both appellate and certiorari jurisdiction. Following review of the Plaintiff's Motion to Dismiss or Affirm, this Court ordered that

> [f]urther consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

STATEMENT ON THE JURISDICTIONAL ISSUE

Since the Appellants have abandoned their claim that the case is properly before the Court under its appellate jurisdiction (Appellant's Brief at 8), the issue is whether the Court should exercise its discretion and grant review under its certiorari jurisdiction. Plaintiff submits that under the Court's Rule 17 guidelines, review is neither appropriate nor required. This is so because:

> (1) The Georgia Court of Appeals' decision is consistent with and follows the teachings of this Court's prior labor preemption decision; and
>
> (2) the *specific* preemption issue raised in this case is of such minor importance in the overall structure of federal labor law that resolution by the Court is unnecessary.

Rule 17.1 of this Court provides that "a review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." The rule goes on to provide that one of the key factors considered is whether a state court has decided an important question of federal law in a way in conflict with applicable decisions of this Court. Sup. Ct. R. 17.1(C). The appellants (and the amicus National Labor Relations Board) contend that the Georgia Court of Appeals failed to follow this Court's applicable labor preemption decisions, stressing that the Georgia decision conflicts with this Court's holding in *Iron Workers* v. *Perko,* 373 U.S. 701 (1963).

In *Perko* a union member won a state court judgment against his union for causing him to be discharged and preventing his subsequent employment as a foreman. Perko claimed that his cause of action was not preempted by the NLRA because he was a *supervisor* and "thus excluded from the scope, operation, and protection of federal law." *Id.* at 705. This Court disagreed on two independent grounds. First, under the facts of that case, Perko's employment status (i.e., employee or supervisor) was not clear and it was possible that the Board would find that he was an "employee" protected by the unfair labor practice provisions of the Act. *Id.* at 706.

Second, the Court stated that even if Perko was in fact a supervisor, there was the *possibility* that the Board could find that the union's actions against Perko also coerced other persons protected by the Act (i.e., employees or employers), thus providing Perko with derivative protection under the Act. *Id.* at 707-708.

Because Perko *might* have had either a direct or derivative cause of action under the NLRA, it was essential that the state yield jurisdiction "if the danger of state interference with national labor policy [was] to be averted," *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959); *Plumbers Local 100* v. *Borden*, 373 U.S. 690, 694 (1963). Accordingly, the Court reversed the state court judgment.

In the present case, there is no dispute over the plaintiff's employment status—he was hired as a supervisor. Thus, under the *Perko* holding, the plaintiff had to pursue a *derivative* federal cause of action, hoping to prove that the union's actions against him either coerced *employees* in the exercise of their rights (an 8(b)(1)(A) violation), or coerced his *employer* in the selection of its supervisor (an 8(b)(1)(B) violation). Plaintiff complied with this *Perko* requirement and did not file his state cause of action *until after he had exhausted his potential federal cause of action.*

With this fact in mind, the Georgia Court of Appeals held that

> [p]ermitting the state court to adjudicate Jones' tort claim would create no realistic risk of conflict with the Labor Board's determination that there had been no unfair labor practices under § 8(b)(1)(B).

This is especially true when one compares the federal and state causes of action actually involved in this litigation. Plaintiff's federal cause of action alleged that Local 926 unlawfuly *coerced his employer,* Georgia Power, in the selection of its supervisor or bargaining representative. NLRA § 8(b)(1)(B), 29

U.S.C. § 158(b)(1)(B) (1976). The critical inquiry was whether Local 926 coerced Georgia Power in the selection of its supervisors, not whether it had interfered with the plaintiff's employment opportunities. Finding insufficient evidence of a federal violation, the Board had no choice but to dismiss plaintiff's federal charges.

The state cause of action is quite another matter. Here the critical inquiry is not whether Local 926 and Archer coerced Georgia Power but rather whether they interfered with plaintiff's contract of employment. To prevail in state court, the plaintiff must prove:

> (1) That he had a valid contract of employment with Georgia Power;
>
> (2) that Local 926 and Archer were aware of his contract of employment;
>
> (3) that Local 926 and Archer intentionally induced Georgia Power to breach its contract of employment with him; and
>
> (4) that he was damaged by that breach of contract.

The comparison of these causes of action shows that the Georgia Court of Appeals was correct in stating that there was no realistic risk of interference with federal labor policy. The Georgia Court of Appeals also closely analyzed and correctly applied this Court's decision in *Sears, Roebuck & Co.* v. *San Diego Council of Carpenters,* 436 U.S. 180 (1978); *Farmer* v. *Carpenters,* 430 U.S. 290 (1977); *Linn* v. *Plant Guard Workers,* 383 U.S. 53 (1966); *Auto Workers* v. *Russell,* 356 U.S. 634 (1958); *United Construction Workers* v. *Laburnum Corp.,* 347 U.S. 656 (1954).

The plaintiff would also draw the Court's attention to the fact that this is a very minor case in the overall structure of federal labor law. The Georgia Court of Appeals decision will not open the state courts to a floodgate of labor relations litigation. It is a very narrow decision standing for the proposition that *supervisors* (not employees) may pursue state court remedies for tortious interference with their contracts of employment if, *and only if,* the National Labor Relations Board has previously determined that the alleged tortious conduct does *not* also constitute an unfair labor practice under the Act. Such a narrow holding does not merit review by this Court.

It is respectfully submitted that appellants have failed to demonstrate sufficient conflict between the Georgia Court of Appeals' decision and this Court's decisions justifying the granting of a writ of certiorari. Sup. Ct. R. 17.1(c). Accordingly, plaintiff urges the Court to dismiss the appellants' alternative writ of certiorari as "improvidently granted." *Wilkerson* v. *McCarthy,* 336 U.S. 53, 67 (1949) (Frankfurter, J., concurring); *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387, 393 (1923).

The remarks of Chief Justice Taft in the *Layne* case seem particularly appropriate to the case at bar. In discussing writs of certiorari which had been improvidently granted, he stated

> If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of

> importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority . . ..

261 U.S. at 393.[5] Since the Georgia Court of Appeals correctly applied this Court's prior decisions on preemption, there is no conflict of authorities. The intertwining of the merits and jurisdictional considerations in the case at bar should not encourage the Court to decide the case on the merits if it appears that certiorari would be improvidently granted.

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[5] Although this quotation ends with the phrase "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals", the quotation has been cited in cases where the writ of certiorari was issued to a state court. *See, e.g., Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955); *Wilkerson* v. *McCarthy, supra,* at 67, n.1 (Frankfurter, J., concurring). It is, therefore, appropriate to conclude that the principle enunciated by Chief Justice Taft applies to writs of certiorari to state courts as well as to federal courts of appeal.

SUMMARY OF ARGUMENT

Appellants and the amicus National Labor Relations Board contend that plaintiff's state cause of action was *and is* preempted by § 8(b)(1) of the Act, citing this Court's holding in *Iron Workers* v. *Perko, supra.* Plaintiff agrees that *Perko* required him to exhaust his *potential* federal remedies before filing his state court actions, but denies that the Board's dismissal of his unfair labor practice charges precluded or barred his subsequent state court action. In prior labor preemption cases, the Court has held that unsuccessful attempts to invoke the unfair labor practice provisions of the Act do not preclude subsequent state tort actions, where the Regional Director declines to issue a complaint based on an explicit finding of insufficient evidence to justify a charge. *Hanna Mining Co.* v. *Marine Engineers,* 382 U.S. 181 (1965); *Linn* v. *Plant Guard Workers,* 386 U.S. 53 (1966). In the case at bar, the Regional Director, after acknowledging plaintiff's supervisory status, specifically stated there was insufficient evidence to support the unfair labor practice charges. There was no longer a bar to state court jurisdiction.

Even though there was no longer any potential for interference with federal labor policy, the Georgia Court of Appeals closely analyzed plaintiff's state tort action to ensure that state jurisdiction was consistent with this Court's preemption holdings. The Georgia Court of Appeals reiterated its prior holdings that: (1) Georgia had a strong interest in protecting its citizens from tortious interference with employment contracts; (2) the activity complained of was not protected by the federal labor law; (3) the issues before the state court were dissimilar enough from the fed-

eral claims to warrant adjudication; and, (4) there was no realistic risk to the effective administration of the national labor policy.

Only after closely scrutinizing these competing factors and interests, did the Georgia Court of Appeals hold that the state court had jurisdiction over plaintiff's claims.

ARGUMENT

I. A SUPERVISOR'S UNSUCCESSFUL ATTEMPT TO OBTAIN RELIEF UNDER THE NLRA DOES NOT PRECLUDE A STATE TORT ACTION FOR INTENTIONAL INTERFERENCE WITH HIS CONTRACT OF EMPLOYMENT.

As previously discussed in the Statement On Jurisdiction, a supervisor discharged as a result of union pressure must *initially* seek relief from the National Labor Relations Board. *Iron Workers* v. *Perko, supra.* This is so because the union's action may have coerced persons protected by the Act, i.e., employees and/or the employer, and is thus arguably an unfair labor practice. NLRA § 8(b)(1)(A)(B). Assuming the supervisor pursues this derivative cause of action with the Board and the Regional Director refuses to issue a complaint, may the supervisor then pursue his state causes of action? In the case of supervisors—who are not *directly* protected by the Act—the answer is YES!

This Court has never held that the mere filing of an unsuccessful unfair labor practice charge precludes subsequent state court proceedings. In two cases, the Court has held that initial unsuccessful attempts to invoke the Board's unfair labor practice jurisdiction did not preclude subsequent state court jurisdiction.

In *Hanna Mining Co.* v. *Marine Engineers,* 382 U.S. 181 (1965), the employer attempted to invoke the Board's jurisdiction on three occasions before filing the state court action. First, the employer petitioned for a representation election, but the Regional Director dismissed on the grounds that the engineers were "supervisors" and automatically excluded from the Act's definition of "employees". *Id.* at 184. The employer then filed unfair labor practice charges alleging that the union's picketing violated the secondary boycott prohibition of the Act, NLRA § 8(b)(4)(B).

The Regional Director declined to issue a complaint under section 8(b)(4)(B) of the NLRA with respect to union picketing, citing as the reason his determination that:

> [T]he evidence . . . did not evince an unlawful objective on the part of the union inconsistent with the ostensibly primary object of the picketing at the situs of the dispute.

382 U.S. at 187 n.7. Distinguishing *Garmon,* the Court held this finding by the Regional Director to "squarely define the nature of the activity" as *not* being an arguable violation of section 8(b)(4)(B). 382 U.S. at 191-92. The Court, therefore, rejected the argument that state jurisdiction was preempted. *Id.*

The relevant facts in *Hanna Mining* are indistinguishable from those here. In the instant case, the Regional Director also refused to issue a complaint for lack of evidence. Specifically, the Regional Director found that:

> [T]he evidence was insufficient to establish that the Union caused your discharge or that it re-

> strained or coerced the Employer in the selection of its representative for the purposes of collective bargaining . . . [T]here was no evidence that it engaged in any unlawful conduct regarding your status as a supervisor. *See* Appellants' Jurisdictional Statement at 26a.

Thus, as in *Hanna Mining,* the Regional Director here has squarely held there to be no violation of the NLRA, and the Georgia courts' exercise of jurisdiction was appropriate under the holding in that case.

The notion that "nothing would remain of the *Garmon* preemption doctrine" and that the normal deference given the Board's " 'specialized knowledge and cumulative experience' would suffer accordingly" if plaintiff's state claim was allowed to proceed, NLRB Brief as *Amicus Curiae* at 24-5, is also without merit. In *Hanna Mining,* the Court held any such risk of interference with the Board's statutory authority to be "slight" and "too minimal to deserve recognition". 382 U.S. at 192. Although acknowledging that a conflict might appear to exist in the abstract, the Court held that:

> [T]he usual deference to Board expertise in applying statutory terms to particular facts assures that its decision would in any event be respected in a high percentage of instances, and so diminished a risk of interference with federal labor policy does not justify use of the preemption doctrine to thwart state regulation bound to be legitimate on this score in almost all cases.

382 U.S. at 190-191.

This same view was implicit in this Court's later holding in *Linn* v. *Plant Guard Workers,* 383 U.S. 53 (1966). The Regional Director in that case had also

refused to issue a complaint, citing a lack of evidence that the union was responsible for the libelous statements which were the subject of the charge. *Id.* at 56-57. Indeed, the Regional Director found the charge to be "wholly without basis". *Id.* at 57. Moreover, the Court itself noted that "the Board has given frequent consideration to the type of statements circulated during labor controversies, and . . . has allowed wide latitude to the competing parties." *Id.* at 60. Despite all of these findings, however, the Court rejected exclusive jurisdiction in the Board. The Court held that so long as the plaintiff company manager in that case was required to prove malice in the state or federal court, there was sufficient protection against unwarranted intrusion on the Board's functions. *Id.* at 65.

In the case at bar, the Regional Director's letter refusing to issue a complaint (J.S. App. 26a), squarely addressed the plaintiff's supervisory status and went on to state that there was insufficient evidence to support plaintiff's derivative claims under § 8(b)(1)(A)(B). Having removed any basis for federal jurisdiction, the Regional Director's explanation clearly "opened the way for subsequent state action."[*]

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[*] In *Machinists Lodge 76* v. *Wisconsin Employment Relations Comm.*, 427 U.S. 132, 137, n.3 (1976), Justice Brennan summarized the Court's holding in *Hanna Mining* by stating:

> "that the Act's amendment expressly to exclude supervisory employees from the critical definition of 'employees' eliminated any serious problems of pre-emption since 'many provisions of the Act employing that pivotal term would cease to operate where supervisors were the focus of concern.'"

The plaintiff, having satisfied the Court's *Perko* requirement, was thus free to pursue his state cause of action.

The *Hanna Mining* and *Linn* decisions indicate that initial attempts to obtain relief from the Board do not resolve the issue of whether relief may ultimately be obtained through state court proceedings. That issue is determined through traditional preemption analysis.

II. THE GEORGIA COURT OF APPEALS CORRECTLY APPLIED THE PREEMPTION HOLDINGS OF THIS COURT.

A. The Holding Of The Georgia Court Of Appeals.

The decision of the Georgia Court of Appeals is based upon the following rationale:

(1) Georgia has a strong interest in protecting the rights of its citizens "to earn a livelihood, and to seek redress against anyone who wrongfully causes him to be discharged from employment." *Wiley* v. *Georgia Power Co.*, 134 Ga. App. 187, 190, 213 S.E.2d 550 (1975); *Georgia Power Co.* v. *Busbin*, 242 Ga. App. 612, 615, 250 S.E.2d 442 (1978), overruled on other grounds. (J.S. App. 2a).

(2) Even though a person's employment contract is at will, he has a valuable contract right which may not be unlawfully interfered with by a *third person. Ott* v. *Gandy*, 66 Ga. App. 684, 19 S.E. 2d 180 (1942); *Georgia Power Co.* v. *Busbin, supra*, at 613. (emphasis added) (J.S. App. 2a).

(3) The activity complained of is neither protected activity within the meaning of § 7 of the NLRA nor an unfair labor practice within the scope of § 8 of the NLRA.

(4) The federal authorities determined that there was insufficient evidence to indicate a violation of the NLRA. (J.S. App. 5a).

(5) The issues before the federal authorities and the state court were dissimilar enough to present separate and distinct issues for adjudication, especially regarding punitive damages and attorney's fees. (J.S. App. 5a, 7a).

(6) A state action based on tortious interference with an employment contract, in the context of this case, would create no realistic risk to the effective administration of national labor policy. (J.S. App. 6a).

B. Applicable Preemption Holdings Of This Court.

Under our federalist form of government, the regulatory power is shared between the national and state governments. Since both governments may have concurrent jurisdiction, there have been many problems of conflict and accommodation, especially in the area of labor law. Pursuant to the Supremacy Clause of the federal constitution,[7] the states may lose their power to act in a given area when Congress enacts legislation dealing with that area. Whether Congress has preempted the field is a matter of legislative intent and often involves difficult problems of statutory construction.

In the field of labor law, there has been more than forty years of litigation over the boundary lines defining the area of exclusive federal control. Over the years, the Court tried varying approaches to the preemption problem by focusing at times on: whether the state rules were specifically designed to regulate labor relations, *see e.g., Auto Workers* v. *Russell,* 356 U.S. 634, 645 (1958); whether the state purported to apply a remedy not provided by the federal scheme, e.g.,

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[7] U.S. Const. art. VI, § 2.

Weber v. *Anheuser-Busch, Inc.*, 348 U.S. 468, 479-480 (1955); or whether the state courts had in fact arrived at conclusions inconsistent with the federal Act, *Auto Workers* v. *Wisconsin Employment Relations Bd.*, 336 U.S. 245 (1949). "[N]one of the approaches proved satisfactory . . . and each was ultimately abandoned." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 291 (1971).

In *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236 (1959), the Court formulated a workable analytical framework for determining whether state court regulation or jurisdiction was preempted by federal law. The Court held that

> [w]hen it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 . . .or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law.

Id. at 244. The preemption doctrine articulated in *Garmon* is not without exceptions, however. The Court has refused to apply the preemption doctrine to activity that otherwise would fall within the scope of *Garmon* if that activity "was a merely peripheral concern of the [Act] . . . [or] touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." *Id.*, at 243-244. *See e.g., Linn* v. *Plant Guard Workers, supra* (malicious libel); *Auto-*

mobile Workers v. *Russell, supra* (mass picketing and threats of violence). The Court has also refused to apply the preemption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." *Motor Coach Employees* v. *Lockridge, supra,* at 297-298. See *Vaca* v. *Sipes,* 386 U.S. 171 (1967) (duty of fair representation claim).

This Court's recent preemption decisions in *Farmer* v. *Carpenters,* 430 U.S. 290 (1977), and *Sears, Roebuck & Co.* v. *San Diego Council of Carpenters,* 436 U.S. 180 (1978), further define the appropriate preemption analysis. In *Farmer,* the Court cautioned "that inflexible application of the [preemption] doctrine is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme." 430 U.S. at 302.

The *Farmer* decision went on to establish a three-prong test to determine whether an individual's state tort claim was preempted by federal law. First, was the underlying conduct protected by the Act. *Id.* at 298. Second, the court should determine whether there was a significant state interest in protecting its residents from the tortious activity and whether that interest was "deeply rooted in local feeling and responsibility." *Id.* Finally, the court has to determine whether the state cause of action would interfere with the effective administration of national labor policy. *Id.*

In *Sears, supra,* the Court applied standard preemption analysis to a state court action for trespassory picketing. Although the picketing was both arguably prohibited and arguably protected, the Court held that it was still not preempted. One of the reasons for not finding preemption was the fact that the issue before the Board and the state court were significantly different. The Court reasoned that

> the federal issue would have been whether the picketing had a recognitional or work-reassignment objective; decision of that issue would have entailed relatively complex factual and legal determinations completely unrelated to the simple question whether a trespass had occurred. Conversely, in the state action, Sears only challenged the location of the picketing; whether the picketing had an objective proscribed by federal law was irrelevant to the state claim.

436 U.S. at 198.

C. Preemption Analysis In This Case.

This Court's holdings in *Perko, Hanna Mining, Farmer* and *Sears,* as applied to the facts of this case, make it abundantly clear that the Georgia Court of Appeals correctly decided the preemption issue. *Perko* required that a supervisor *initially* seek relief with the National Labor Relations Board because the union's conduct was arguably an unfair labor practice. The plaintiff complied and exhausted this potential federal remedy. And, under the holdings in *Hanna Mining* and *Linn,* the failure of the Regional Director/General Counsel to issue a Complaint did not preclude the plaintiff from seeking relief in the state courts.

The plaintiff also satisfied the three-prong test established by *Farmer*. First, the union's alleged tortious interference with plaintiff's contract of employment was not protected by the Act. Second, the Georgia Court of Appeals specifically reaffirmed that Georgia considered protecting its citizens against this type of activity to be "deeply rooted in local feeling and responsibility." (J.S. App. 3a-4a). *See also, Sheet Metal Workers* v. *Carter,* 133 Ga. App. 872, 212 S.E. 2d 645 (1975), *cert. denied,* 423 U.S. 1078 (1976); *Electrical Workers* v. *Briscoe,* 143 Ga. App. 417, 239 S.E.2d 38 (1977), *cert. denied,* Ga. Supreme Court (1978). Finally, there was no possibility of interference with the federal regulatory scheme because the federal agency had already investigated the case and found that there was insufficient evidence to indicate a violation of the federal act.

A comparison of the differences between the federal and state causes of action, including the available remedies, indicated that preemption was not appropriate in this case. The federal inquiry was whether the appellants' actions coerced either the employer, Georgia Power, or its employees. Finding insufficient evidence of such coercion, the Board properly refused to issue a Complaint. Whether or not the union's actions coerced Georgia Power or its employees was irrelevant to the state court inquiry. There the questions would be: (1) Was there a valid contract of employment? (2) Did the appellants know of the contract? (3) Did they intentionally interfere with that contract? and, (4) Did their actions cause a breach of that contract damaging the plaintiff?

The decision of the Georgia Court of Appeals demonstrates that it considered all of these factors and

then determined that the state court had jurisdiction to decide plaintiff's claim. It is respectfully submitted that the Georgia Court of Appeals' decision is consistent with the prior decisions of this Court and should be affirmed.

III. AN UNFAIR LABOR PRACTICE PROCEEDING IS NOT THE *EXCLUSIVE FORUM* FOR A SUPERVISOR TO SEEK RELIEF FOR A LABOR UNION'S ILLEGAL CONDUCT.

Although this case has been argued, decided and appealed on the issue of federal preemption, the real issue is whether unfair labor practice proceedings, before the National Labor Relations Board, is a *supervisor's* exclusive forum to seek redress for a union's illegal actions.

To avoid potential interference with federal labor policy, the plaintiff was required to initially present his case to the National Labor Relations Board, *Iron Workers* v. *Perko, supra;* however, having satisfied this *exhaustion of potential federal remedy requirement,* the plaintiff maintains that he was free to seek relief in the state courts.

In 1947, Congress amended the Act and specifically removed supervisors from its protections by deleting them from the statutory definition of "employee." NLRA §§ 2(3)(11) and 14(a). These amendments were designed to ensure that employers had the loyalty of their front line supervisors. They were adopted in direct response to Board decisions holding that supervisors were "employees" within the meaning of the Act. *See, e.g., Packard Motor Car Co.,* 64 N.L.R.B. 1212 (1945), *enforced,* 330 U.S. 485 (1947); *see* S. Rep. No. 105, 80th Cong., 1st Sess. 409-411 (1947). The

legislative history of these amendments does not, however, support the proposition that "supervisors" were thereby deprived of all other statutory and common law rights. Iit is respectfully submitted that these amendments did not, and could not, create a class of individuals who were stripped of all their civil rights.

Although deprived of the statutory protections of the Act, supervisors nonetheless retain their civil rights and are free to pursue relief in state and federal courts—so long as that relief does not conflict with the overriding concerns of the National Labor Relations Act. The plaintiff, having exhausted his potential remedies under the National Labor Relations Act, was free to pursue his cause of action in the state courts.

CONCLUSION

For the reasons set forth above, appellants' alternate writ for certiorari should either be DENIED AS IMPROVIDENTLY GRANTED or granted with the Georgia Court of Appeals decision then being AFFIRMED.

Respectfully submitted,

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September 30, 1982

STATUTORY APPENDIX

Sections 2(3) and (11) of the National Labor Relations Act, 29 U.S.C. §§ 152(3) and (11), provide in pertinent part:

> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, . . . but shall not include . . . any individual employed as a supervisor. . . .
>
> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 7 of the Act, 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . ..

Section 8(b)(1) of the Act, 29 U.S.C. § 158(b)(1) provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its

> own rules with respect to the acquisition or retention of membership therein: or (B) an employer in the selection of his representatives for the purpose of collective bargaining or the adjustment of grievances;

Section 14(a) of the Act, 29 U.S.C. § 164(a), provides in pertinent part:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer . . . shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

Petitioner's Reply Brief

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No. 81-1574

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LOCAL 926, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO AND TOMMY D. ARCHER,
Appellants,

v.

ROBERT C. JONES,
Appellee.

On Appeal From The Court of Appeals State of Georgia

REPLY BRIEF FOR LOCAL 926, IUOE, ET AL.

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On Appeal From The Court of Appeals State of Georgia

REPLY BRIEF FOR LOCAL 926, IUOE, ET AL.

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1. Plaintiff-appellee Jones would avoid the controlling precedential force of *Iron Workers v. Perko*, 373 U.S. 701 (*"Perko"*) by giving *Perko* a novel interpretation:

> To avoid potential interference with federal labor policy, the plaintiff was required to initially present his case to the National Labor Relations Board, *Iron Workers* v. *Perko, supra;* however, having satisfied this *exhaustion of potential federal remedy requirement*, the plaintiff maintains that he was free to seek relief in the state courts. [Pl. Br. 24, emphasis in original.][1]

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[1] "Pl. Br." will refer to the brief for plaintiff-appellee Jones in this Court; "Un. Br." will refer to the opening brief for Local 926 IUOE, et al.; "J.S." will refer to the jurisdictional statement.

This is tantamount to a confession of error: Plaintiff did *not* "exhaust his potential federal remedies before filing his state court action;" he failed to exercise his right of appeal to the NLRB's General Counsel from the Regional Director's decision. (See Un. Br. 3, 20; Pl. Br. 6.)[2] The judgment in the instant case must therefore be reversed.

But plaintiff's reading of *Perko* and the other preemption cases in this Court is so fundamentally unsound that we feel obliged to demonstrate why the state courts would have been without jurisdiction over his complaint even if he had appealed to the General Counsel and the result

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[2] Plaintiff's request that the Court not grant certiorari under 28 U.S.C. § 2103 (it having been conceded that the case is not properely here on appeal, Un. Br. 8) rests primarily on his submission that "appellants have failed to demonstrate sufficient conflict between the Georgia Court of Appeals' decision and this Court's decisions justifying the granting of a writ of certiorari." (Pl. Br. 11.) Our argument on the merits in our opening brief shows that the decision below conflicts with this Court's precedents, most notably *Perko*, and thus demonstrates that this case fits comfortably within the last clause of this Court's Rule 17.1(c): "When a state court * * * has decided a federal question in a way in conflict with applicable decisions of this Court.". It bears mention, moreover, that even in arguing that certiorari be denied plaintiff finds it necessary to misstate the true situation: "Plaintiff * * * did not file his state cause of action *until after he had exhausted his potential federal cause of action.*" (Pl. Br. 9, emphasis in original).

Plaintiff also seeks to denigrate the importance of this case. (Pl. Br. 11.) In this connection, plaintiff understates the breadth of the Georgia Court of Appeals' ruling, which rests primarily on the proposition that the states may entertain suits against unions for tortious interference with employment whether brought by supervisors or employees. (See J.S. 2a-7a and especially the court's reliance therein on its prior decision in *Sheet Metal Workers International v. Carter*, 133 Ga. App. 872, 212 S.E. 2d 645, cert. den. 423 U.S. 978, involving an NLRA "employee".) Only as an alternative ground for decision did the court below rely on the plaintiff's status as a supervisor. (J.S. 8a.) In that connection, the Court purported to distinguish *Perko*; as we showed at Un. Br. 18-21 the stated grounds are wholly inadequate.

had been an affirmance of the dismissal of the charge on the ground stated by the Regional Director.

2. Plaintiff does not contend that the state courts retain jurisdiction whenever a party has unsuccessfully sought relief before the Labor Board. Rather, plaintiff's contention appears to have two elements: First, that exhausting Board remedies does not in itself in all situations preclude state court jurisdiction; and second, if a supervisor has exhausted his Labor Board remedies the state courts do have jurisdiction over the supervisor's claim against a union for tortious interference with an employment contract. The first of these propositions is correct, but the second is without substance and cannot be reconciled with *Perko*.

In support of the first of the foregoing propositions, plaintiff relies especially on *Hanna Mining v. Marine Engineers*, 382 U.S. 181, and on *Linn v. Plant Guard Workers*, 383 U.S. 53. He says:

> The *Hanna Mining* and *Linn* decisions indicate that initial attempts to obtain relief from the Board do not resolve the issue of whether relief may ultimately be obtained through state court proceedings. That issue is determined through traditional preemption analysis. [Pl. Br. 18]

We agree, but this does not materially advance plaintiff's contention that the state courts had jurisdiction over his complaint. For, as we demonstrated in our opening brief, "traditional preemption analysis" and most particularly its application in indistinguishable circumstances in *Perko* compels the conclusion that the state courts did not have jurisdiction over plaintiff's claim here.

Plaintiff's view (Pl. Br. 9, 13, 14, 22, 24) that *Perko* requires only that a supervisor exhaust his Labor Board remedies is entirely unjustified. The Court's conclusion that the states were without jurisdiction to entertain

Perko's claim was based entirely on the nature of the controversy. There is nothing in the Court's opinion in *Perko*, or in its companion case, *Borden*, which even remotely suggests that the state courts would have been authorized to entertain those suits for interference with contractual relationships if Messrs. Perko or Borden had first sought relief from the Labor Board. Indeed, in no case in which the state courts have been held to be without jurisdiction has it been indicated, let alone decided that the result would have otherwise if the plaintiff had but exhausted his Board remedies.[3]

In denying the potential of interference with the federal scheme if his complaint is reinstated plaintiff points to "the differences between the federal and state causes of action, including the available remedies" (Pl. Br. 23). However, plaintiff's effort to differentiate the substance of his Labor Board charge and his state tort claim is unfaithful to the allegations of his complaint, which he nowhere quotes, although the issue in this case is whether the state courts had jurisdiction to entertain that complaint. Paragraph 6 thereof reads as follows:

> On or about June 20, 1978, Thomas D. Archer, acting on behalf of and as an agent of Local 926,

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[3] Plaintiff's effort to draw from *Farmer v. Carpenters*, 430 U.S. 290, a "three-prong test" of preemption (Pl. Br. 21, 23) is misguided. First, *Farmer* adhered to the established "arguably protected" and "arguably prohibited" test. Thus, while plaintiff asserts that the union's alleged conduct "was not protected by the Act" (Pl. Br. 23) the correct question is whether the conduct was *arguably* protected. As we demonstrate at pp. 9-10, *infra*, noncoercive requests by a union that an employer discharge a supervisor *are*, at least, arguably protected. Second, the Georgia Court of Appeals' reliance on the "deeply rooted in local feeling and responsibility" exception, adopted at Pl. 23, is unsound for the reasons explained at Un. Br. 27-29, which plaintiff does not address. Most important, as we develop in the text the plaintiff errs in asserting that "there was no possibility of interference with the federal regulatory scheme because the federal agency had already investigated the case and found that there was insufficient evidence to indicate a violation of the federal act." (Pl. Br. 23.)

> *maliciously and with full intent, intimidated and coerced Georgia Power Company, or caused Georgia Power Company to be intimidated and coerced* into breaching its employment contract with the Plaintiff. [J.S. 15a, emphasis added]

Only by ignoring his own allegations can plaintiff assert: "Whether or not the union's actions coerced Georgia Power or its employees was irrelevant to the state court inquiry." (Pl. Br. 23; see also Pl. Br. 9-10 which seeks to draw the same distinction.) Accurately viewed, plaintiff's Labor Board and state court allegations are indistinguishable.

Indeed, the plaintiff's position here would lead to a paradox: If plaintiff had persuaded the General Counsel (by exhausting his administrative remedies) to issue a charge under § 8(b)(1)(B) and the Board had ultimately found a violation of that section on the ground that, as he alleged in his charge, the union had restrained and coerced the employer to discharge him (see Un. Br. 3) plaintiff would have been entitled to an award of reinstatement and back pay. It is clear too that if the Board had provided a remedy for a violation of § 8(b)(1)(B) plaintiff's state claim would have been preempted; the difference between Labor Board remedies under § 10(c) and "the available remedies" in state court (Pl. Br. 23) is one of the potential conflicts between federal and state law which underlies the preemption doctrine (*San Diego Unions v. Garmon*, 359 U.S. 236, 243, 246-247, see Un. Br. 29-31.) Plaintiff nevertheless argues that the state courts retain jurisdiction to award damages (unlimited by § 10(c)) if, in causing the employer to discharge him, the union used peaceful persuasion rather than restraint or coercion (Pl. Br. 23-24).

3. Finally, plaintiff's pervasive theme that the present case is somehow different because he is a supervisor

under the NLRA rather than an employee (Pl. Br. 24-25 and passim) is wholly without merit. The reversal, on the same day, of the state court judgments for tortious interference with employment relations in *Borden* (involving an employee) and *Perko* (involving a supervisor) should suffice. But given plaintiff's reliance on *Hanna Mining*, it may be useful to compare the situation in that case and in this case.

Hanna Mining involved picketing by a union to compel the employer to bargain with the union over the terms and conditions of employment of individuals whom the Labor Board had determined to be supervisors. The General Counsel of the Board had determined, by refusing to issue complaints, that the picketing did not violate § 8(b)(4)(B) of the NLRA because the union had not exceeded the bounds of lawful primary picketing and that the picketing did not violate § 8(b)(7) of the NLRA because in seeking to represent "supervisors" rather than "employees" the union fell outside the regulatory sweep of that section (382 U.S. at 184-186). In holding that the state courts were not without jurisdiction to enjoin the picketing, Justice Harlan summarized the *Garmon* doctrine:

> [I]n general, a State may not regulate conduct arguably "protected by § 7, or prohibited by § 8" of the National Labor Relations Act, see 359 U.S. at 244-246; and the legislative purpose may further dictate that certain activity "neither protected nor prohibited" be deemed privileged against state regulation of, cf. 359 U.S. at 245. [*Hanna Mining*, 382 *U.S.* at 187-188.]

However, the Court concluded that once it had been authoritatively determined by the Board that the union was seeking to organize individuals who were supervisors under the NLRA, and by the General Counsel that the union's picketing did not violate § 8(b)(4)(B) or § 8(b)

(7) of the NLRA, the potential conflict between the NLRA and state law was eliminated.[4] The union's submission in *Hanna Mining* that its efforts to unionize supervisors were intended by Congress to "remain free from state regulation as well as Board authority" (382 U.S. at 189) was deemed to "fail[] utterly in light of the legislative history, for the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees" (*id.*).

Here, however, even if the General Counsel (rather than his subordinate, the Regional Director) had determined that the union had not restrained or coerced the employer, it could not be stated—as it must be to preclude preemption—that the union's alleged conduct is not "arguably protected" and does not "fall in some middle range impliedly withdrawn from state control" (*Hanna Mining*, 382 U.S. at 193).

There are several lines of analysis that lead to the conclusion that a union's peaceful and successful request that an employer discharge a supervisor were intended by Congress to be left free from state control.

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[4] In a rather desperate effort to equate his case with *Hanna Mining*, despite his failure to appeal from the Regional Director's dismissal of his charges, plaintiff states that the "Regional Director" had dismissed the Hanna petition for an election and that the "Regional Director" had declined to issue a complaint under § 8(b)(4)(B) (Pl. Br. 15). Actually, Hanna had appealed the Regional Director's decision dismissing its representation petition to the Board, and the decision dismissing its §§ 8(b)(4)(B) & 8(b)(7) charges to the General Counsel; in each instance the Regional Director's decision had been affirmed. See 382 U.S. at 184-186. The Court's opinion makes entirely clear that it was the rulings of the Board and of the General Counsel—respectively the ultimate authorities in the agency for determining whether to hold an election and whether to issue an unfair labor practice complaint—which settled "with unclouded significance" the supervisory status of Hanna's engineers and the absence of an arguable § 8(b)(4)(B) violation. *Id.* at 190, 191-192, quoting *Garmon*, 359 U.S. at 246.

i) Congress protected supervisors against discharge at the behest of the union derivatively to safeguard employees' rights under § 8(b)(1)(A) or alternatively to safeguard employer rights under § 8(b)(1)(B). (See *Perko*, 373 U.S. at 707-708.) In both these provisions Congress utilized the phrase "restrain or coerce" in defining the prohibited means. Most significantly for present purposes, it is an unfair labor practice for a union to restrain or coerce an employer in the selection of his representatives for purposes of collective bargaining or of the adjustment of grievances; thus, if (and only if) the supervisor is such an employer representative, he is protected from discharge caused by union restrain or coercion against his employer. The Board in construing § 8(b)(1)(B) has drawn an antithesis between "restraint or coercion" and "a mere attempt at persuasion in a free market-place of ideas." (*Southern California Pipe Trades*, 120 NLRB 249, 250-251.) The Trial Examiner's decision in that case (which was reversed on the facts but not the law by the Board) has a full discussion of the legislative history of the phrase "restrain and coerce" in § 8(b)(1). (*Id.* at 258-261.) Indeed, the phrase "restrain or coerce" is distinctly narrower than "cause or attempt to cause" which appears in § 8(b)(2), which makes it an unfair labor practice for a union "to cause or attempt to cause an employer to discriminate against an *employee* in violation of § 8(a)(3)."

Congress' careful line-drawing in establishing the unfair labor practices dealing with union efforts to cause employers to discharge or otherwise to act adversely against individuals strongly suggests that "Congress nonetheless desired that in their peaceful facets these efforts remain free from state regulation as well as Board authority. Compare *Teamsters Union v. Morton*, 377 U.S. 252, 258-260." (*Hanna Mining*, 382 U.S. at 189.)

ii) As *Hanna Mining* emphasized, the 1947 amendments which excluded supervisory workers from the

definition of employees in § 2(3) and the concurrent enactment of § 14(a) was for the benefit of *employers*. It was deemed to be contrary to the spirit of those amendments to withdraw from the state courts the authority to enjoin picketing to compel an employer to bargain with supervisors.

But employers have no interest in allowing a supervisor to obtain damages against a union which has peacefully persuaded the employer to discharge that supervisor. On the contrary, the employer, who has been granted the §§ 2(3) & 14(a) right to discharge supervisors without state interference (see *Beasley v. Food Fair of North Carolina*, 416 U.S. 653), has an interest in exercising that right knowledgeably. That interest is served when the union is free to express its views to the employer that the morale of the work force would improve if a particular individual is removed as supervisor because the supervisor has been too strict with the employees, or careless with their safety or because he is unpopular with them because he is not a union member. This view of the matter is buttressed by Congress' approach to the precise problem of union conduct directed to removing supervisors—protection only of employer representatives as defined in § 8(b)(1)(B) and more significantly, its use of the narrow phrase "restrain or coerce" which preserves the union's ability to engage in "persuasion in a free market-place of ideas" on the subject of the employer's selection of such representatives. To award damages against the union when it successfully persuades an employer to discharge a supervisor would inevitably burden that marketplace, and deprive the employer of information which he may value.

iii) The legitimacy of the union's interest is confirmed by a series of cases in which the Board and courts have held that employees may not be discharged for making known their ideas concerning managerial supervisors. The Board and the courts have differed as to the standards for determining when such employee activity is

affirmatively protected by § 8(a)(1). The Board has taken the position that if the supervisor or other management official is of a sufficiently low level that he can affect the employees' job interest, concerted activity to protest or cause his discharge or retention is protected against employer interference by the NLRA regardless of its form. However:

> In [contrast], courts have generally held over Board protest than employee strikes over changes in even low level supervisory personnel are not protected. See *Henning & Cheadle, Inc. v. NLRB*, [522 F.2d 1050, 1055 (7th Cir.)]; *American Art Clay Co. v. NLRB*, [328 F.2d 85, 90-91 (7th Cir.)]; *Dobbs House, Inc. v. NLRB*, [325 F.2d 531, 538-39 (5th Cir.)]. On the other hand, courts have found protected the writing of letters expressing opposition, *NLRB v. Phoenix Mutual Life Insurance Co.*, 167 F.2d 983 (7th Cir.) *cert. denied*, 335 U.S. 845, 69 S.Ct. 68, 93 L.Ed. 395 (1948), or the simple voicing of complaints, *NLRB v. Guernsey-Muskingum Elec. Coop., Inc.*, 285 F.2d 8 (6th Cir. 1960). By thus examining both the substantive interest and the means of advancing it, courts have balanced more finely the competing interests involved. The result is a general absence of *per se* rules. In some situations, with very low level supervisors and a close nexus to actual, preexisting work conditions protests, employee strikes may even be protected. *NLRB v. Okla-Inn*, [488 F.2d 498, 503 (10th Cir.)]. [*Abilities and Goodwill, Inc. v. N.L.R.B.*, 612 F.2d 6, 9-10 (1st Cir.)]

While the disagreement between the Board and the courts creates uncertainty as to whether a particular concerted activity concerning the identity of a supervisor is protected from employer interference, it is at least clear that such activity is "arguably protected", as that phrase is used in *Garmon*. And conduct in which employees may engage on a concerted basis, is also conduct in which those employees may engage through their representative, the union, as long as the union does not violate a prohibition of the Act, such as § 8(b)(1)(B).

CONCLUSION

For the reasons stated in our opening brief and herein, the decision below should be reversed with instructions to reinstate the trial court's order dismissing the complaint.

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ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF GEORGIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE IN SUPPORT OF APPELLANTS

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INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

This case presents the question whether the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, preempts appellee's state court damages action against a labor organization and its business agent for allegedly inducing a breach of appellee's employment contract by coercing an employer into refusing to permit appellee to retain a supervisory position for which the employer had selected him. The resolution of this issue may well affect the jurisdiction of the National Labor Relations Board over unfair labor practices defined in Section 8(b)(1)(A) and (B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(A) and (B). The potential for interference with the Board's jurisdiction threatened by the exercise of state court jurisdiction over a tort claim similar to the one involved here was noted by this Court in *Local No. 207, Iron Workers* v. *Perko*, 373 U.S. 701 (1963). The Board's interest is even stronger here because one of its Regional Di-

rectors refused to issue a complaint on an unfair labor practice charge filed by appellee with respect to the union conduct at issue in the state court suit, and the letter explaining that refusal notes that the regional office found insufficient evidence to support the claim that the union in fact caused appellee's discharge—an issue that the decision below now permits appellee to litigate in the state courts.

STATEMENT

1. On June 20, 1978, appellee Robert C. Jones filed an unfair labor practice charge with the Atlanta Regional Office of the National Labor Relations Board, alleging that "on or about June 15, 1978, and thereafter, [appellant Local 926, International Union of Operating Engineers] caused and procured the discharge of Robert C. Jones, and thereby coerced the employer [Georgia Power Company] in the selection of its supervisors and bargaining representative, because said individual had not been a member in good standing of said labor organization" (J.S. App. 25a). The alleged conduct was asserted to constitute a violation of Section 8(b)(1)(A) and (B) of the Act, 29 U.S.C. 158 (b)(1)(A) and (B), which makes it an unfair labor practice for a labor organization or its agents to

> restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances[.]

The Regional Office investigated the allegations, and, on July 19, 1978, the Regional Director notified appellee by letter that he had decided not to issue a complaint on the charge (J.S. App. 26a). The Regional Director gave the following explanation for his conclusion that further proceedings were unwarranted (*ibid.*):

> The Region concluded that the evidence was insufficient to establish that the Union caused your discharge or that it restrained or coerced the Employer in the selection of its representative for the purpose of collective

> bargaining. Rather, it appears that the Employer implemented certain changes in its supervisory structure which included your removal from the project. While the Union did participate in the discussions regarding the changes, there was no evidence that it engaged in any unlawful conduct regarding your status as a supervisor.

This letter also advised appellee of his right to file an administrative appeal of the Regional Director's decision (*ibid.*).[1]

2. Appellee did not file such an appeal. Instead, in December 1978, he filed a complaint in the State Court of Fulton County, Georgia, against appellant Local 926 (hereinafter "the Union"), appellant Thomas Archer (the Union's business agent), and the Georgia Power Company (hereinafter "the Company") (J.S. 5; J.S. App. 14a–17a). In Count I he alleged that he had formerly been a member of the Union, but had resigned in 1974; that in 1978 the Company had offered him the position of Equipment Superintendent at a Company plant; that he had reported for work in that position on June 12, 1978; and that on June 20, 1978, appellant Archer, acting on behalf of the Union, had maliciously coerced the Company into "breaching its employment contract" with him (*id.* at 15a). He sought $25,000 in damages for "lost wages and privileges," and $50,000 in punitive damages, together with costs and attorneys' fees (*id.* at 15a–16a). A second count sought similar relief from the Company for "maliciously" discharging him because he "was not a member of [the Union]" (*ibid.*). In an amendment to the Complaint, Count II was expanded to allege a conspiracy between the Union, appellant Archer, the Company, and another firm—Superior Electric—with the aim of depriving him of his employment and denying him "rights of em-

[1] Whenever a regional director declines to issue a complaint on an unfair labor practice charge, the person filing the charge may, pursuant to Section 102.19 of the Board's Rules and Regulations (29 C.F.R. 102.19), obtain review of the refusal by filing an appeal with the Board's General Counsel in Washington, D.C.

ployment" because he was not a member of the Union (*id.* at 18a).[2]

Extensive discovery ensued (J.S. App. 22a–23a), but on December 14, 1979, the trial court heard motions by the Company, the Union, and Archer for dismissal of the complaint on the grounds that the claims were federally preempted and that the court therefore lacked subject matter jurisdiction (J.S. App. 9a). On November 10, 1980 (*id.* at 11a), the trial court granted the dismissal motions.

Applying the preemption test of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 243–244 (1959), as explained in *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 187–197 (1978), the court concluded that appellee's claims of "tortious interference with an employment contract" were preempted because they presented to the Court a controversy "identical to the controversy presented to the NLRB" (J.S. App. 10a) and because they did not come within the preemption exception for state regulation touching "'interests * * * deeply rooted in local feeling and responsibility'" (*San Diego Building Trades Council* v. *Garmon*, *supra*, 359 U.S. at 244), such as laws against violent acts. Noting that appellee's charge had been dismissed by the NLRB Regional Director on grounds of insufficient evidence rather than on the basis of a determination that it was not within the Board's jurisdiction, the trial judge concluded that he was being asked "to take a second look at the same actions"—an inquiry that he lacked jurisdiction to make (J.S. App. 11a).[3]

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[2] Appellee did not formally ask for damages against Superior Electric (J.S. App. 18a–20a) and appears to have abandoned any claim against that employer before he filed his appeal to the court of appeals.

[3] The trial court thus declined to resolve the factual dispute between appellee and the defendants regarding why he was not allowed to work as the Company's Equipment Superintendent at the plant in question. (As the Company explained its position in its brief to the court of appeals (Br. 2–3), appellee had been offered the job by a manager whose decision to add an extra supervisor was overruled by a higher Company official, and at the time that official ordered that alternatives to the manager's plan be considered, he knew neither appellee's identity

3. On appellee's appeal, the Court of Appeals of the State of Georgia reversed as to the claim in Count I against the Union and Archer, but affirmed the dismissal of claims against the Company.

Relying on its earlier decision in *IBEW* v. *Briscoe*, 143 Ga. App. 417, 239 S.E.2d 38 (1977), which also concerned a supervisor's claim that his employment had been terminated as a result of union coercion of his employer, the court of appeals concluded that appellee could proceed with his claim against the Union and Archer. It reasoned that, although the controversy as it would be presented to the Board under Section 8(b)(1)(B) and the controversy as it was presented in appellee's contract interference claim arose "from the same conduct," they were "dissimilar enough to present separate and distinct issues for adjudication" (J.S. App. 5a). Apparently acknowledging that under the preemption test as formulated in *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, *supra*, a state court's exercise of jurisdiction will generally be preempted when it would involve "a risk of interference with the unfair labor practice jurisdiction of the Board" (436 U.S. at 197), the court of appeals concluded that allowing the state court to adjudicate appellee's "tort claim would create no realistic risk of a conflict with the Labor Board's determination that there had been no unfair labor practices under § 8(b)(1)(B)" (J.S. App. 6a). The court also noted (*ibid.*) that, if the state courts were denied jurisdiction over appellee's claim against the Union and its business agent, he would be denied the right—enjoyed under state law but not under the federal scheme—to seek punitive damages.

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nor his union membership status. According to the Company (Br. 3–4), at a meeting on June 20, 1978, which included Union representatives, the participants agreed on a solution to the equipment problem that did not require the addition of a new position.) Of course, for purposes of considering whether to dismiss the complaint, the trial court necessarily assumed the truth of appellee's allegations that the Company had discharged him because of the Union's objections to him, objections that were in turn based on his having resigned from the Union and worked on a series of nonunion jobs.

The court distinguished cases involving preemption of state regulation of peaceful picketing by observing, among other things, that such cases, unlike the present tort case, did not involve "an interest deeply rooted in local feeling or responsibility, the power of a state to protect the rights of its citizens" (J.S. App. 7a; citation omitted). Finally, the court sought to distinguish *Local No. 207, Iron Workers* v. *Perko*, 373 U.S. 701 (1963), in which this Court—pointing to Sections 8(b)(1)(A) and 8(b)(1)(B) of the Act—held that federal law preempted a state damages action against a union and several of its officials for conspiring to have the plaintiff's employer discharge him from his job as a foreman. The court below observed that the plaintiff in *Perko* had a fluctuating employment status, and might have been found to be an "employee" rather than a supervisor (J.S. App. 8a). It also pointed out (*ibid.*) that he might have had "sufficient responsibilities with regard to grievances to bring § 8(b)(1)(B) into play," whereas in the present case the regional director had "indicated in his letter that there had been no coercion of the employer in the selection of its representative for the purpose of collective bargaining under § 8(b)(1)(B)."

The court of appeals affirmed the trial court's dismissal of appellee's claims against the Company on two grounds. It held that, under Georgia law, the Company was free to "terminate" appellee's employment "at will," and thus could not be held liable in damages for conspiring to do so (J.S. App. 2a–3a). Insofar as appellee's claim against the Company was based on the State's right-to-work statutes, the court noted (*id.* at 8a) that the claim was preempted under the reasoning of *Beasley* v. *Food Fair of North Carolina*, 416 U.S. 653 (1974), holding that federal policy embodied in Section 14(a) of the Act, 29 U.S.C. 164(a), forbids federal agencies or states from imposing on employers an obligation to treat their supervisors as employees, *i.e.*, as persons who enjoy the protected right to join, or refrain from joining, labor organizations.

The Supreme Court of Georgia denied appellants' application for a writ of certiorari and their motion for reconsideration of that denial (J.S. App. 12a). Thereafter appellants

filed a notice of appeal to this Court (*id.* at 13a) and a jurisdictional statement invoking this Court's jurisdiction under 28 U.S.C. 1257(1) (J.S. 2).[4]

SUMMARY OF ARGUMENT

This case is controlled by *Local No. 207, Iron Workers* v. *Perko*, 373 U.S. 701 (1963), in which the Court held that the National Labor Relations Act preempts a state court's jurisdiction over a common law damages action against a

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[4] On May 24, 1982, the Court postponed the question of jurisdiction to the hearing on the merits. Appellants' attempt to invoke this Court's jurisdiction under 28 U.S.C. 1257(1) seems clearly erroneous since the court of appeals did not hold any federal statute invalid; and appellants cite no state statute drawn into question on grounds of repugnancy to federal law so as to invoke jurisdiction under 28 U.S.C. 1257(2).

We believe, however, that the Court could consider the case on writ of certiorari under 28 U.S.C. 1257(3). *Palmore* v. *United States*, 411 U.S. 389, 396 (1973). It would appear that the state court judgment here for review is final for purposes of 28 U.S.C. 1257. The federal issue—whether the state court's jurisdiction over appellee's tort claim is preempted by federal law—has been finally decided in the state courts, although there are to be further proceedings in which appellants might prevail on the merits on nonfederal grounds. Reversal of the court of appeals on the federal issue would, however, preclude those further proceedings, and a refusal to hear the issue at this stage might "seriously erode federal policy." *Cox Broadcasting Co.* v. *Cohen*, 420 U.S. 469, 482–483 (1975). Accord, *Local No. 438, Construction Laborers* v. *Curry*, 371 U.S. 542, 549–550 (1963). In this case the federal policy is one of protecting the jurisdiction of the National Labor Relations Board from state court interference and protecting parties subject to Board jurisdiction from facing proceedings "which the state courts have no power to conduct" (371 U.S. at 550), particularly where, as here, the Board has already investigated the allegations common to both proceedings and found no merit to them.

There appears no likelihood that further federal issues will arise in the case, raising the spectre of piecemeal review. Compare *Flynt* v. *Ohio*, 451 U.S. 619, 621 (1981). Moreover, because the tort claim on which the trial is to go forward solely concerns the union's alleged interference with employment rights and raises no separate claims, such as intentional infliction of mental distress, evidentiary proceedings are not likely to illuminate the issues in the case so as to warrant a denial of review on prudential grounds. Compare *Minnick* v. *California Department of Corrections*, 452 U.S. 105, 126–127 (1981).

union for securing the plaintiff's discharge from his position as a "'superintendent and foreman.'" *Id.* at 703, 708. Here, as in *Perko*, the plaintiff (appellee Jones) alleged that union pressure on the employer constituted tortious interference with his employment contract, and those same allegations of union pressure stated arguable violations of Section 8(b)(1)(A) and (B) of the National Labor Relations Act. The present case differs from *Perko* in that appellee had filed an unfair labor practice charge with the NLRB with respect to the Union's conduct, and the Board's Regional Director, after an investigation of the charge, declined to issue a complaint. That distinction, however, does not warrant a different conclusion on the preemption issue. Indeed, the case for preemption is, if anything, stronger: the rejection of the unfair labor practice charge was based on a determination that the Union had not caused the appellee's discharge, and appellee's tort suit represented an effort to have that central issue redetermined by the state court. Thus, under *Perko* the court of appeals clearly erred in reversing the trial court's dismissal of the complaint on federal preemption grounds.

Other labor law preemption decisions of this Court, as well, require the dismissal of the complaint on preemption grounds. *Perko* merely summarized and applied the general rule of *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), that, with two exceptions, state jurisdiction must yield when the activities at issue are arguably protected or arguably prohibited by the National Labor Relations Act. That rule was designed to advance the congressional objective of achieving a uniform application of the restraints and protections embodied in the Act through centralizing the Act's administration in a single federal agency. The two *Garmon* exceptions—for matters that form only a "peripheral concern" of the Act and matters that touch on "interests * * * deeply rooted in local feeling and responsibility" (359 U.S. at 243–244)—have been elaborated upon in subsequent decisions of the Court, but none suggests that state tort law sanctions for union interference with employment contracts fall outside the general *Garmon* rule. Indeed, in two of those deci-

sions—*Amalgamated Association of Street Employees* v. *Lockridge*, 403 U.S. 274, 295 (1971), and *Farmer* v. *Carpenters, Local 25*, 430 U.S. 290, 300 n.9 (1977)—the Court has cited *Perko* with approval. In sum, the specific holding of *Perko* and the general guidance furnished by this Court's other labor law preemption decisions require the dismissal of appellee's tort complaint against the Union and its agent.

ARGUMENT

THE STATE COURT'S JURISDICTION OVER APPELLEE'S CLAIM FOR MALICIOUS INTERFERENCE WITH CONTRACT ALLEGEDLY RESULTING FROM UNION COERCION OF HIS EMPLOYER IS PREEMPTED BY SECTION 8(b)(1)(A) AND (B) OF THE NATIONAL LABOR RELATIONS ACT

In *Local No. 207, Iron Workers* v. *Perko*, 373 U.S. 701 (1963), this Court held that federal law precludes a state court's exercise of jurisdiction over a damages action against a union for securing the plaintiff's discharge from his position as a "'superintendent and foreman.'" *Id.* at 703, 708. As we show below, the present case is squarely within the *Perko* holding and rationale; and other federal labor law preemption decisions of this Court likewise require the conclusion that state court jurisdiction over the damages claim in this case is preempted.

A. Under *Perko*, the State Court's Exercise of Jurisdiction Over Appellee's Claims Against Appellants Is Preempted by Section 8(b)(1)(A) and (B) of the Act

Appellee alleges in his complaint (J.S. App. 15a) that the Company offered him a job as an Equipment Superintendent and that the Union coerced the Company into breaching its employment contract with him. He seeks damages for the loss of the job, arguing that the Union's coercion constitutes the common law tort of malicious interference with contract (*id.* at 15a, 16a; Appellee's Motion to Dismiss or Affirm at 3). This claim is virtually indistinguishable from the tort claim in *Perko*. The plaintiff there had alleged that the union and certain of its officials "had demanded that the company discharge him from his duties as 'superintendent

and foreman'" (373 U.S. at 703); and the evidence at trial indicated that the union was motivated by the fact that the plaintiff had, in a past job, trained members of a rival craft to do work claimed by the Iron Workers. The Ohio Supreme Court, relying on *IAM* v. *Gonzales*, 356 U.S. 617 (1958), had concluded that the state court could properly exercise jurisdiction over the case because the allegations could be construed as a claim that the union and its officials had "'committed a common-law tort against him by conspiring to deprive him of his right to earn a living and interfering with his contract of employment'" *Local No. 207, Iron Workers* v. *Perko*, *supra*, 373 U.S. at 703, quoting from the lower court opinion, 168 Ohio St. 161, 162, 151 N.E.2d 742, 744 (1958).[5]

In an opinion by Justice Harlan, this Court reversed. At the outset, it rejected the contention that state court jurisdiction was supported by *Gonzales*, because "the crux of the action here concerned alleged interference with the plaintiff's existing or prospective employment relations and was not directed to internal union matters." 373 U.S. at 705. That, of course, is also true of the present case.

The Court also rejected (373 U.S. at 705–706) the contention that the case was beyond the reach of federal law—a contention predicated on the theory that the plaintiff was a "supervisor" at the time of the alleged tort and "was thus excluded from the scope, operation, and protection of federal law." The Court noted, first (*id.* at 706), that it was not clear that under the facts of the case, the Board would conclude that the plaintiff was a supervisor within the meaning

[5] In *Gonzales*, an individual sued his union for expelling him, allegedly in violation of the union's constitution and bylaws. He sought to have the expulsion overturned and, in addition, sought damages for lost wages and physical and mental suffering that were a consequence of the expulsion. The Court found no ground for preemption, noting, among other things (356 U.S. at 620–621), that the Board was not concerned with "the protection of union members in their rights as members," and that, since the state court clearly had jurisdiction to order the plaintiff's reinstatement in the union, there was no reason not to allow it to "fill out this remedy by an award of damages for loss of wages and suffering resulting from the breach of contract."

of Section 2(11) of the Act, 29 U.S.C. 152(11),[6] rather than an employee. Were the plaintiff an employee, the Court reasoned (373 U.S. at 706–707; footnote omitted), his allegations would come "within the ambit of the unfair labor practices prohibited by §§ 8(b)(1)(A) and 8(b)(2) of the Act." Second, the Court observed (373 U.S. at 707–708) that, even if the plaintiff were a statutory supervisor, his claims were arguably cognizable under Section 8(b)(1)(A) and (B) of the Act.

The first point is not relevant to the present case.[7] The second point concerning arguable violations of both Sections 8(b)(1)(A) and 8(b)(1)(B), however, plainly applies. The Board can, in some circumstances, find violations of Section 8(b)(1)(A) of the Act based on a labor organization's coercive acts against a supervisor when it is shown that the coercion has the effect of restraining or coercing one or more employees in the exercise of their rights under Section 7 of the Act, 29 U.S.C. 157; and it has singled out the construction industry as a sector in which union coercion with respect to supervisory positions is especially likely to result in restraints on employee rights, in violation of Section 8(b)(1)(A). The Board has done so largely because it is not uncommon in that industry for workers to shift back and forth between supervisory and nonsupervisory jobs.

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[6] This provision and other cited sections of the Act are reproduced in the Statutory Appendix, *infra*.

[7] It is apparently not disputed by the parties that the position from which the Union allegedly procured appellee's removal was a supervisory position (J.S. App. 8a); and the Regional Director's letter refusing to issue a complaint on appellee's unfair labor practice charges also reflected the view that the position was supervisory (*id.* at 26a). Moreover, because Georgia has laws (commonly known as "right-to-work laws") outlawing even those union security agreements that are permitted under the proviso to Section 8(a)(3) (see J.S. App. 8a; Ga. Code Ann. § 54–905 (rev. 1982)), its courts, by virtue of the special dispensation of Section 14(b) of the Act, 29 U.S.C. 164(b), could properly exercise jurisdiction over any claim by appellee, as an *employee*, that his discharge was effected through enforcement of a bargaining agreement provision requiring union membership as a condition of his employment. *Retail Clerks, Local 1625* v. *Schermerhorn*, 375 U.S. 96, 105 (1963).

Thus, a union's coercive and discriminatory actions with respect to a supervisory job are likely to intimidate the subject of that discrimination from exercising his Section 7 rights when he later shifts to employee status.[8] The complaint in the present case, of course, alleges coercion with respect to a position on a construction project.

The potential application of Section 8(b)(1)(B) of the Act to the allegations of the complaint is even clearer. The Board can find a violation of Section 8(b)(1)(B) on a showing

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[8] *Local Union No. 725, Plumbers (Powers Regulator Co.)*, 225 N.L.R.B. 138 (1976), enforced, 572 F.2d 550 (5th Cir. 1978); *Plumbers Local Union No. 137 (Hames Construction and Equipment Co.)*, 207 N.L.R.B. 359 (1973). See also *Iron Workers Local 433 (Associated General Contractors of California, Inc.)*, 228 N.L.R.B. 1420, 1427 (1977), enforced, 600 F.2d 770 (9th Cir. 1979), cert. denied, 445 U.S. 915 (1980). In *Local 725, Plumbers*, the Board held that the union violated Section 8(b)(1)(A) of the Act when it caused an employer to withdraw its offer of a supervisory position to the charging party; and the Board's remedy included an award of backpay against the union. The Board gave two reasons for providing the remedy notwithstanding the exclusion of supervisors from the protections of the Act: It found that certain employees who depended on union job referrals had learned of the union's coercion and were thereby intimidated in the exercise of *their* rights under the Act (225 N.L.R.B. at 138 n.2; see also *id.* at 145); and it also found that the charging party, although attempting to assume a supervisory position, had worked in construction employee positions both before and after the incident of union coercion and was intimidated in the exercise of *his* rights as an employee because of his dependence on union referrals (*id.* at 145).

The Board has recently narrowed its theory for finding analogous violations under Section 8(a)(1) of the Act on the basis of an employer's discriminatory sanctions against supervisors, and will no longer find a violation based solely on the fact that discharging or disciplining a supervisor for union activities might, by force of example, discourage employees from exercising their Section 7 rights. *Parker-Robb Chevrolet, Inc. (Automobile Salesmen's Union, Local 1095, United Food & Commercial Workers)*, 262 N.L.R.B. No. 58, 110 L.R.R.M. 1289 (June 23, 1982). The decision in *Local 725, Plumbers* apparently survives, however, insofar as it is based on a recognition of the pattern of fluctuating job status in the construction industry and the likelihood that an individual whose future economic welfare as an employee depends on the attitudes of union officials will be coerced by the union's show of strength in preventing him from obtaining a supervisory position.

that a labor organization has sought to dictate to an employer who should or should not serve as the employer's representative for the purposes of collective bargaining or the adjustment of grievances. *International Typographical Union (Haverhill Gazette Co.)*, 123 N.L.R.B. 806 (1959), enforced, 278 F.2d 6 (1st Cir. 1960), aff'd by an equally divided Court, 365 U.S. 705 (1961); *Florida Power & Light Co.* v. *IBEW*, 417 U.S. 790, 798–799 (1974) (collecting cases). Moreover, although Congress made such union coercion an unfair labor practice in order to protect the interests of *employers*—their interest in, among other things, being able to select, as their representatives for adjusting employee grievances, individuals who would not be subservient to the union or vulnerable to union pressure (*Florida Power & Light Co.* v. *IBEW, Local 641, supra*, 471 U.S. at 798, 804)—Section 8(b)(1)(B) also functions as a protection for those individuals whom employers wish to select as their supervisors with grievance adjustment or bargaining functions. Thus, as the Board has explained in *Silver Bay Local Union No. 962, Pulp, Sulphite & Paper Mill Workers (Alaska Lumber & Pulp Co.)*, 215 N.L.R.B. 414 (1974) (Supp. Decision), enforced, 510 F.2d 1364 (9th Cir. 1975), following remand (498 F.2d 26 (1974)), it has followed a consistent policy of awarding backpay to supervisors who suffer loss of earnings as a result of union coercion directed at their employers. 215 N.L.R.B. at 414 & n.4 (collecting cases).[9]

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[9] The rationale for such awards is that the employer's right to have "'an uncoerced group of supervisors whose loyalty to him has not been prejudiced'" is impaired if a supervisor suffers uncompensated loss as a result of union coercion within the meaning of Section 8(b)(1)(B); for "a supervisor who has suffered a period of employment loss and resulting financial loss because of the unlawful efforts of a hostile union will certainly be aware of the dangers of displeasing the union." 215 N.L.R.B. at 414, quoting *International Association of Heat & Frost Insulators & Asbestos Workers, Local 127 (Cork Insulating Co. of Wisconsin, Inc.)*, 189 N.L.R.B. 854 (1971).

Contrary to the views of the Court of Appeals of the State of Georgia in *IBEW* v. *Briscoe*, 143 Ga. App. 417, 425, 239 S.E.2d 38, 42 (1977)—a state precedent on which the court relied in this case (J.S. App. 4a)—anyone, including supervisors, may file a Section 8(b)(1)(B)

Appellee has alleged that the Union coerced the Company into breaching its "employment contract" with him regarding the position of "Equipment Superintendent," and it is undisputed in this case that the position is supervisory. It is, of course, true that the category of supervisory positions is not coextensive with the category of positions held by "representative[s] for the purposes of collective bargaining or the adjustment of grievances" protected by Section 8(b)(1)(B). *Florida Power & Light* v. *IBEW*, *supra*, 417 U.S. at 811 n.21. Nonetheless, it is sufficient, for the purposes of that Section, that the coercive acts in question be aimed at influencing the employer's selection of individuals who would possess *authority* to adjust employee grievances should the occasion arise. *American Broadcasting Companies*, v. *Writers Guild*, 437 U.S. 411, 427 n.25 (1978). And the likelihood that a supervisor such as appellee will be authorized, at least on occasion, to adjust the grievances of employees he supervises is sufficiently great to warrant the conclusion that the complaint's allegation of union coercion identifies conduct that is *arguably* prohibited by Section 8(b)(1)(B), and therefore beyond state court jurisdiction, absent a showing that some exception to the preemption doctrine applies.[10]

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charge. 29 C.F.R. 102.9 (unfair labor practice charge may be filed "by any person"). See also *NLRB* v. *Fant Milling*, 360 U.S. 301, 307 (1959) (charge merely sets in motion the machinery of an inquiry). The Section 8(b)(1)(B) charge in *Silver Bay* was, in fact, filed by the supervisor who was terminated as a result of union coercion (198 N.L.R.B. 751 (1972)).

[10] The Board has, in the past, held that because supervisors form the logical "reservoir" from which an employer is likely to select his representatives for collective bargaining or grievance adjustment, union coercion directed at controlling the choice of supervisors is a violation of Section 8(b)(1)(B), even without a specific showing that the supervisors in question possess collective bargaining or grievance adjustment authority. See, *e.g.*, *International Association of Heat & Frost Insulators & Asbestos Workers, Local 127 (Cork Insulating Co. of Wisconsin, Inc.)*, 189 N.L.R.B. 854 (1971). This "reservoir doctrine" was rejected by the Second Circuit in *NLRB* v. *Rochester Musician's Association, Local 66*, 514 F.2d 988, 992 (1975), and accepted with limitations by the Third Circuit. *Newspaper Guild, Erie Newspaper Guild, Local 187* v. *NLRB*, 489 F.2d 416, 420–422 (3d Cir. 1973).

Permitting a state court to establish its jurisdiction over a case by making its own initial determination that a particular supervisor is not within the class of individuals embraced by Section 8(b)(1)(B) would be contrary to general preemption principles. See *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173, 177–182 (1962). Thus, in a companion case to *Perko—Local 100, Plumbers* v. *Borden*, 373 U.S. 690 (1963), a case involving a state court's exercise of jurisdiction over a tort action filed by an employee based on a union's interference with his employment opportunities—the Court explained (373 U.S. at 696; footnote omitted):

> We need not and should not now consider whether the [union's] activity in this case was federally protected or prohibited, on any of the theories suggested above or on some different basis. It is sufficient for present purposes to find, as we do, that it is reasonably "arguable" that the matter comes within the Board's jurisdiction.

The Court also made it clear in *Borden* (373 U.S. at 698) that the rubric under which a state court deals with the conduct at issue—whether "described in terms of tort or contract"—is irrelevant; the state court's jurisdiction over the claims is preempted if that type of conduct is arguably within the Board's jurisdiction.[11] In both *Borden* and *Perko* the suits were framed as claims for interference with contract or the right to contract (373 U.S. at 692, 703), and the Court's conclusion that state court jurisdiction was

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In any event, it is clear that the mere existence of grievance adjusting authority in a supervisory position is sufficient to bring it within the ambit of Section 8(b)(1)(B). *American Broadcasting Companies* v. *Writers Guild, supra*, 437 U.S. at 427 n.25; *NLRB* v. *Rochester Musician's Association, Local 66, supra*, 514 F.2d at 992.

[11] In *Borden*, the union interfered with plaintiff's employment opportunities by refusing to give him a hiring hall referral, and the Court found (373 U.S. at 694–695) that this arguably violated Sections 8(b)(1)(A) and 8(b)(2) of the Act, even if the union's refusal was arguably based on plaintiff's noncompliance with hiring hall rules. The Court noted it was also possible that the Board would consider the union's conduct an invocation of lawful hiring practices that should be permitted under the Act (373 U.S. at 695).

nonetheless preempted in each case similarly forecloses the Georgia courts from asserting jurisdiction in this case over what the court of appeals described as appellee's "action for tortious interference with an employment contract" (J.S. App. 2a).

Of course, where the Board has disavowed jurisdiction over a specific type of conduct, the preemption barrier is usually removed. *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters, supra*, 436 U.S. at 199 n.29; *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Association*, 382 U.S. 181, 188–191 (1965).[12] Contrary to the suggestion of the court of appeals (J.S. App. 8a), however, that has not occurred here and thus does not furnish a ground for distinguishing *Perko*. The Regional Director's letter dismissing appellee's unfair labor practice charge does not state that the charge was unfounded because the supervisory position in question did not carry adequate grievance responsibilities to merit protection from union coercion under Section 8(b)(1)(B) (J.S. App. 26a). Rather, the dismissal was based on a determination that the evidence indicated that appellee's loss of employment resulted from changes in the Company's supervisory structure made for reasons other than submission to union pressure (*ibid.*). Hence, as the trial judge observed (J.S. App. at 11a), appellee was simply asking the state court to take "a second look at the same actions" and reach a conclusion different from that reached by the Board's Regional Director with respect to the motivation for the Company's actions. Compare *Hanna Mining Co.* v. *District 2, Marine Engineers Beneficial Association, supra*, 382 U.S. at 185–186, 191–192 (no preemption of state jurisdiction over union picketing aimed at organizing supervisors where General Counsel declined to issue complaint on grounds

[12] But see *Lodge 76, IAM* v. *Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976); *Teamsters Local 20* v. *Morton*, 377 U.S. 252 (1964); Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1351–1352 (1972) (preemption where state court's exercise of jurisdiction would upset balance of power between labor and management under federal scheme, notwithstanding fact that conduct is not arguably protected or prohibited by the Act).

that the picketing in question "did not exceed the bounds of lawful picketing under the Board's standards" implementing Section 8(b)(4) of the Act).

In sum, the present case is controlled by *Perko*, and under that holding the trial court correctly dismissed the complaint on the grounds of federal preemption. As we show below, *Perko* accurately summarized and applied labor law preemption principles established in earlier decisions of this Court, and it is fully consistent with subsequent preemption decisions of the Court in the labor context. Indeed, subsequent decisions have cited *Perko* with approval and provide additional authority for reversing the decision of the court of appeals.

B. Reversal of the Decision Below on the Authority of *Perko* Would Be Consistent with Subsequent Labor Law Preemption Decisions of this Court

The decision in *Perko* rested in large part on the Court's conclusion that the case fell "squarely within the preemption principles declared in *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 [1959]." 373 U.S. at 705–706. In *Garmon*, the Court laid down the general rule that "[w]hen it is clear *or may fairly be assumed* that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield." 359 U.S. at 244 (emphasis added). The "governing consideration," the Court explained (*id.* at 246), "is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

The Court emphasized that potential conflicts involved more than differences in substantive legal standards. Quoting from *Garner* v. *Teamsters Union*, 346 U.S. 485, 490 (1953), the Court observed (359 U.S. at 242–243) that Congress had created a specialized agency and set of procedures for administering the Act's substantive rules, because it "'evidently considered that centralized

administration of specially designed procedures was necessary to obtain a uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies.'"

Garmon acknowledged two exceptions to its broad preemption rule: state courts, applying state law, could regulate conduct arguably subject to the Act if the matter in question was "a merely peripheral concern" of the Act or if it involved "interests * * * deeply rooted in local feeling and responsibility." 359 U.S. at 243–244. The Court cited *IAM* v. *Gonzales*, *supra*, (wrongful expulsion from union membership), as a case coming within the former exception. The latter exception was illustrated by cases involving state regulation of violent conduct or "imminent threats to public order," such as *UAW* v. *Russell*, 356 U.S. 634 (1958), and *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U.S. 656 (1954).[13]

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[13] *Garmon* thus narrowed both of those decisions. It took special care to point out that, notwithstanding references in *Russell* and *Laburnum* to the availability under state law of relief (such as punitive damages) that was not available under the federal scheme, both decisions rested on the type of conduct involved, not on the availability of additional relief under state law. 359 U.S. at 248 n.6. As the Court also pointed out (*ibid.*), the extensive damages in *Laburnum* essentially remedied the direct consequences of violence rather than simply the kind of boycott activity arguably subject to Board jurisdiction. See also Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1358–1359 (1972). Subsequent decisions of the Court have also characterized *Russell* and *Laburnum* as controversies escaping preemption because of the states' interest in controlling violence. *Amalgamated Association of Street Employees* v. *Lockridge*, 403 U.S. 274, 234 n.7 (1971); *id.* at 319 (White, J., dissenting); *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 195 (1978).

Thus, the court of appeals erred in this case in concluding, in reliance on *Russell* and *Laburnum*, that a finding of no preemption was dictated in part by the fact that appellee could obtain punitive damages under state law for the type of union coercion alleged, whereas the Board could only award him backpay (J.S. App. 6a–7a). The court of appeals' reliance on *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966) (discussed page 19, *infra*), is also misplaced, since the Court's point there (383 U.S. at 63) was that the State could provide relief for an injury which the Board could not remedy at all.

Hence, in *Perko* and its companion case, *Local 100, Plumbers* v. *Borden*, *supra*, both of which involved conduct arguably subject to the Board's unfair labor practice jurisdiction and did not involve violence of any kind, the Court correctly concluded that *Garmon* required it to hold that state regulation of the conduct through tort and contract remedies was preempted by federal law.

Subsequent decisions of the Court have indicated that the *Garmon* test is not to be applied mechanically and have expanded on the exceptions, but they cast no doubt on the continuing validity of *Perko* and *Borden*.

In *Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966), the Court concluded that the National Labor Relations Act did not preempt state court jurisdiction over an action for malicious libel brought by a company official against the union and certain individuals for allegedly false and defamatory statements uttered during an organizing campaign. In so holding, the Court reasoned that the state interest in protecting residents from malicious libels was one of those interests "'deeply rooted in local feeling and responsibility'" for which *Garmon* made an exception (*id.* at 62), and it noted (*id.* at 63) that the question whether a statement was defamatory was irrelevant to the Board's consideration of whether the statements constituted unfair labor practices. *Linn* does not suggest, however, that state courts are free to resolve the same issues that would come before the Board in an unfair labor practice or representation case, so long as the court deals with the controversy under a different label (*e.g.*, interference with contract).

In *Vaca* v. *Sipes*, 386 U.S. 171 (1967), an action under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. 185, which involved a duty of fair representation claim against the plaintiff's union, the Court refused to hold the claim preempted, notwithstanding the existence of cases in which the Board had held that a violation of a union's duty of fair representation constituted an unfair labor practice. But *Vaca* was predicated in part on recognition of the fact that the courts themselves had created the

doctrine that unions owe such a duty to employees they represent,[14] and that this cause of action was a settled part of the federal labor law scheme before the Board concluded that the duty of fair representation could be read into Sections 8(b)(1)(A) and 8(b)(2) of the Act. 386 U.S. at 177–178, 181. Where the Board was essentially following the lead of the courts, the potential for conflicting rules of substantive law warned against in *Garmon* was not as great. *Id.* at 181.

Vaca did not, however, constitute an invitation to state courts to expand or duplicate the federal labor law scheme through the application of common law tort and contract remedies to suits by employees against unions. See Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights*, 51 Tex. L. Rev. 1037, 1063–1064 (1973). Any suspicion that *Vaca* might have undercut *Perko* and *Borden* was dispelled by the Court's decision in *Amalgamated Association of Street Employees* v. *Lockridge*, 403 U.S. 274 (1971), which cited both decisions with approval, characterizing them (403 U.S. at 295) as cases that defined "the reach of *Gonzales* within the more comprehensive framework *Garmon* provided" and emphasizing (*id.* at 295–296) that both involved interference with employment relations, a matter distinct from internal union affairs, since the latter were not a central concern of the National Labor Relations Act.[15]

In *Farmer* v. *Carpenters, Local 25*, 430 U.S. 290 (1977), the Court unanimously held that the Act did not preempt a

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[14] See, *e.g.*, *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953).

[15] In *Lockridge* the employee sued his union for breach of contract, alleging that the union's action in procuring his discharge under the union security clause for nonpayment of dues violated terms of the union constitution. The Court held that state court jurisdiction over the claim was preempted by federal law under *Garmon*.

Even commentators critical of *Lockridge* have not disagreed with its reaffirmation of *Perko*. Cox, *Labor Law Preemption Revisited*, 85 Harv. L. Rev. 1337, 1376 n.174 (1972) (arguing that *Borden* and *Perko* are consistent with *Gonzales*, which represents an analysis preferable to that in *Lockridge*); Bryson, *A Matter of Wooden Logic: Labor Law Preemption and Individual Rights* 1037, 1109–1118 (1973) (suggesting that state regulation be confined to union expulsion cases, enforcement of union fines, and torts in the nature of violence and libel).

tort action brought in state court by a union member against his union for intentional infliction of emotional distress, although that claim was joined in the complaint with claims based on the union's alleged discrimination against him in job referrals. The Court viewed the case as one akin to *Linn*, in which the State had an important interest to protect—in this case the protection of its residents from the intentional infliction of mental distress—which could be pursued without the risk of imposing sanctions on activities protected by the Act or of involving the state court in the merits of any dispute that was arguably within the Board's jurisdiction. 430 U.S. at 298–300. The Court made it clear, however, that the state court was not free to entertain any claim based on the discriminatory referral allegations (*id.* at 305; footnote omitted):

> Union discrimination in employment opportunities cannot itself form the underlying "outrageous" conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. Nor can threats of such discrimination suffice to sustain state-court jurisdiction. It may well be that the threat, or the actuality, of employment discrimination will cause a union member considerable distress and anxiety. But something more is required before concurrent state * * * jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.

A state court, therefore, is *not* free to consider whether a discharge is the result of union coercion of the employer and, upon a positive finding, to award damages for the discharge, when the Board's jurisdiction over unfair labor practices would call upon it to consider whether the same discharge resulted from union coercion and to award appropriate remedies if it found such coercion. But the point is made even clearer in *Farmer* by the Court's express reaffirmation of *Borden* and *Perko* (430 U.S. at 300 n.9): it cites these cases to illustrate the *Garmon* principle that state causes of action may be preempted even when the

state has acted "'through laws of broad, general application [*e.g.*, tortious interference with the right to contract] rather than laws specifically directed towards the governance of industrial relations.'"[16]

Finally, in *Sears, Roebuck & Co.* v. *San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the Court concluded that the exercise of state court jurisdiction at issue was not preempted by federal law, but in reviewing and elaborating upon the *Garmon* preemption doctrine, the Court implicitly confirmed the continuing vitality of *Borden* and *Perko*.

The state court suit was an action in trespass brought by a department store owner (Sears) to secure the removal of union pickets from its property. This Court agreed that the picketing was arguably in violation of two different subsections of Section 8(b) of the Act, although in both cases the violation depended entirely on the union's objective. The Court also noted that, again depending on the union's objective, the picketing was arguably protected by Section 7 of the Act (436 U.S. at 185–187). The Court concluded, however, that there was no preemption because the aspect of the conduct subject to state regulation in the trespass action was distinct from the matters subject to Board jurisdiction. As the Court explained (*id.* at 187), the case was not "one in which 'it is clear or may fairly be assumed' that the subject matter which the state court sought to regulate—that is the location of the picketing—[was] either prohibited or protected by the Federal Act." Because the

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[16] Because *Farmer* cited *Borden* and *Perko* with apparent approval and carefully distinguished union discrimination in employment opportunities from state interests that may be protected through state court litigation, there is no basis for suggesting, as did the court of appeals below in reliance on its own earlier opinions (J.S. App. 6a), that federal preemption is precluded whenever it can be said that the state suit implicates the State's interest in protecting the rights of its citizens. Many of the rights protected by the National Labor Relations Act—*e.g.*, the right not to be discharged for union activity or the right not to be subjected to a secondary boycott—are rights that a state might well wish its citizens to enjoy. But that does not mean that the states are free to set up their own enforcement systems, in the guise of tort and contract remedies, to supplement the federal labor law scheme.

controversy as it might have been presented to the Board focused entirely on the union's picketing objectives (*i.e.*, whether the picketing sought to induce recognition as a collective bargaining representative or sought work-reassignments), whereas the state court was concerned only with whether the picketing took place on Sears' property, the two controversies were completely distinct. There was this, in the Court's view, no serious risk that the state court might, in some way, trench on the unfair labor practice jurisdiction of the Board (*id.* at 197–198).

Sears, therefore, is distinguishable in a critical respect from the present case and from *Perko*, which, as we have shown, controls this case. In *Perko*, the state court's concern with the supervisor-plaintiff's discharge focused on whether that discharge was the result of improper pressure by the union on the employer. Had the controversy been presented to the Board, it would have been concerned with the same matter. Similarly, in the present case, the union's alleged "coercion" of the employer was at the heart of both the controversy before the Board and the controversy presented to the court, although two different theories of union liability were involved. In both controversies, the relationship between union dealings with the employer and appellee's loss of employment was critical to the outcome. The investigation of the Board's regional office apparently led the Regional Director to conclude that there was no causal relationship, and appellee was essentially asking the state court for a different ruling on that question. Nothing in *Sears* suggests that individuals are free to have such questions redetermined in the state courts.[17]

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[17] In simply asserting (J.S. App. 4a) that there was no risk that the state court's consideration of the tort action would interfere with Board jurisdiction, the court of appeals failed to examine the issues common to the Board controversy and the court controversy. The court of appeals also relied on a misreading of the Regional Director's letter refusing to issue an unfair labor practice complaint, apparently regarding it (*id.* at 8a) as a finding that the character of appellee's supervisory position placed the case entirely outside the ambit of Section 8(b)(1)(B), rather than as a finding that the discharge was not the result of union coercion, as appellee alleged. The trial judge, however, correctly recognized (J.S. App. 11a) that he was being asked to take a

The Court in *Sears* did acknowledge that the location question—whether the union was entitled to picket on Sears' property—might be raised if the Board were to consider whether Sears' demand that the union remove the pickets violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by interfering with employee organizational rights; but, as the Court noted (436 U.S. at 201–202), the Board's consideration of that issue was essentially outside Sears' control. A Board investigation of the union's right to picket at that location would take place only if someone filed an unfair labor practice charge against Sears, and the union had failed to do so. Because the union had the opportunity to invoke the Board's jurisdiction and thereby preempt state court jurisdiction over this question—and because the union would be likely to do so were there a significant chance that the Board would regard the trespassory picketing as protected—there was little risk that the state court, in deciding the question of the union's right to picket at that location, would reach a different result from the Board. 436 U.S. at 207.

The circumstances are completely different in *Perko* and the present case. In both cases the plaintiffs in the state tort actions were free to file unfair labor practice charges with the Board that would focus, at least in part, on the core of their complaints against the union. Of course, as the present case illustrates, such an individual cannot be assured that he will obtain a favorable decision from the Board or that he will even succeed in securing the issuance of an unfair labor practice complaint on his charges. But those uncertainties exist with respect to *any* type of conduct potentially subject to the Board's unfair labor practice jurisdiction. Were state court jurisdiction to be held free from preemption simply on the ground that procedures for processing unfair labor practice charges under the National Labor Relations Act may result in a final negative decision without a judicial hearing,[18] then nothing would remain of

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"second look" at the same matter—i.e., the reason for appellee's discharge—already decided by the Regional Director.

[18] As we have noted (page 3, *supra*), appellee did not avail himself of the administrative review procedure that the Board does make available.

the *Garmon* preemption doctrine.The congressional policy embodied in the decision to entrust "administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience" (*San Diego Building Trades Council* v. *Garmon*, *supra*, 359 U.S. at 242) would suffer accordingly.

CONCLUSION

The judgment of the Court of Appeals of the State of Georgia should be reversed.

Respectfully submitted.

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AUGUST 1982

APPENDIX

Sections 2(3) and (11) of the National Labor Relations Act, 29 U.S.C. 152(3) and (11), provide in pertinent part:

> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, * * * but shall not include * * * any individual employed as a supervisor * * *.
>
> (11) The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Section 7 of the Act, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(a)(3) of the Act, 29 U.S.C. 158(a)(3) provides:

> It shall be an unfair labor practice for an employer—
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by an action defined in section 8(a) of the Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such em-

ployment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made and (ii) unless following an election held as provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership[.]

Sections 8(b)(1) and (2) of the Act, 29 U.S.C. 158(b)(1) and (2), provide:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein: or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues

and the initiation fees uniformly required as a condition of acquiring or retaining membership;

Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, provides in pertinent part:

> **(a) Venue, amount, and citizenship.** Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Docket Sheet

NO. 81-1574-ASX	TITLE	Local 926, International Union of Operating Engineers, AFL-CIO, et al., Appellants v. Robert C. Jones

DOCKETED	COURT
Feb. 22, 1982	Court of Appeals of Georgia

DATE	PROCEEDINGS AND ORDERS
	Counsel for Appellants: James T. Langford
	Counsel for Appellee: Robert F. Gore
Feb. 22, 1982	Statement as to jurisdiction filed. (Record filed)
Mar. 31, 1982	DISTRIBUTED. 4-16.
Apr. 5, 1982	Response requested.
May 4, 1982	Motion to dismiss or affirm filed.
May 5, 1982	DISTRIBUTED. 5-20.
May 24, 1982	Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

June 24, 1982	Order extending time to file the joint appendix and appellants' brief on the merits until Aug. 7, 1982.
Aug. 3, 1982	Order further extending time to file the appellants' brief on the merits until Aug. 10, 1982.
Aug. 4, 1982	Joint appendix filed.
Aug. 6, 1982	Brief, amicus curiae, for the National Labor Relations Board in support of appellants filed.
Aug. 10, 1982	Brief for respondents Local 926, IUOE, et al. filed.
Aug. 12, 1982	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Sept. 13, 1982	Order extending time to file the appellee's brief on the merits until Sept. 30, 1982.
Sept. 30, 1982	Brief for the appellee filed.
Oct. 4, 1982	The motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument is GRANTED.
Nov. 24, 1982	Reply brief for petitioner Local 926, IUOE, et al. filed. (D
Dec. 1, 1982	ARGUED.